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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

CAROL HOOD, *as guardian ad litem of Zachary Hood, a minor,*

Petitioner,

v.

MEDFORD TOWNSHIP BOARD OF EDUCATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a public school that has a policy of rewarding reading achievement by allowing students to bring in a favorite story from home to read aloud to the class, but then bars a student from reading his otherwise appropriate selection solely because it was based on a Bible story, engages in viewpoint discrimination in violation of the Free Speech Clause of the First Amendment.

LIST OF PARTIES

The parties to the proceedings below were Carol Hood, as guardian *ad litem* of Zachary Hood, a minor; Grace Oliva; Gail Pratt; Patrick Johnson; Medford Township Board of Education; Leo Klagholtz, Commissioner of Education of the State of New Jersey; and the State of New Jersey Department of Education.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the *en banc* Court of Appeals (App. 1a) is reported at 226 F.3d 198 (3d Cir. 2000). The second panel opinion of the Court of Appeals (App. 40a) is reported at 195 F.3d 167 (3d Cir. 1999). The first panel opinion of the Court of Appeals (App. 66a) is unreported. The opinion of the District Court (App. 71a) is reported at 990 F. Supp. 341 (D.N.J. 1997).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit sought to be reviewed was entered on August 28, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner seeks plenary review of an *en banc* decision of the Court of Appeals for the Third Circuit. That decision affirmed by an equally divided court, six-to-six, the district court's decision granting judgment on the pleadings and holding that public school officials did not engage in viewpoint discrimination when they promised a student the opportunity to read aloud to the class his favorite story, but then censored the one he chose simply because it was based on a Bible story.

Alternatively, petitioner respectfully requests that this Court hold the petition for final determination pending this Court's decision in *Good News Club v. Milford Central School*, No. 99-2036, currently being briefed. That case presents the question whether opening school facilities to a broad range of activities, including those teaching children morals and values, but excluding a Christian youth organization on the grounds that its activities were religious, constitutes viewpoint discrimination.

1. Factual Background

In 1996, petitioner's son, Zachary Hood, was in the first grade at Haines Elementary School, a public school in Medford, New Jersey. App. 73a. His teacher, respondent Grace Oliva, had a policy of rewarding students for reading achievement by allowing them to bring in a favorite story from home to share with the class by reading it aloud. App. 12a, 73a. The only conditions placed by the teacher on the readings were that they be of appropriate length and complexity for first graders. App. 12a, 73a. When Zachary qualified for the honor, he selected "A Big Family" from *The Beginner's Bible*, a story loosely based on the biblical account of Jacob and Esau. App. 12a, 74a. It reads, in its entirety:

> Jacob traveled far away to his uncle's house. He worked for his uncle, taking care of sheep. While he was there, Jacob got married. He had twelve sons. Jacob's big family lived on his uncle's land for many years. But Jacob wanted to go back home. One day, Jacob packed up all his animals and his family and everything he had. They traveled all the way back to where Esau lived. Now Jacob was afraid that Esau might still be angry at him. So he sent presents to Esau. He sent servants who said, "Please don't be angry anymore." But Esau wasn't angry. He ran to Jacob. He hugged and kissed him. He was happy to see his brother again.

App. 12a, 44a-45a, 74a.

The story was of appropriate length and complexity. App. 47a. Zachary's teacher nevertheless forbade Zachary to share his story with the class, telling him he could not read it "because of its religious content." App. 12a, 74a. She instead required Zachary to read it to her in private. App. 13a, 74a.

His teacher admitted to Zachary's mother, petitioner Carol Hood, that she had barred him from reading his story, saying that the story amounted to a Bible reading, and that it "might influence other students." App. 13a, 45a. Zachary's mother then appealed to the principal of the school, respondent Gail Pratt, who stood behind the teacher, but for slightly different reasons. Ms. Pratt claimed that Zachary's reading his story aloud would be "the equivalent of 'praying.'" App. 13a, 45a. Petitioner next appealed to the school superintendent, respondent Patrick Johnson, and to respondent Medford Board of Education, asking them to require that Zachary be allowed to read his story, but they declined to respond. App. 13a, 45a,

75a.

This incident echoed a similar incident that had occurred one year earlier, when Zachary was in kindergarten. As a Thanksgiving assignment, Zachary's teacher asked each of her students to make a poster of something for which he or she was thankful. App. 5a, 73a. Zachary decided to make a poster showing that he was thankful for Jesus. App. 5a, 73a. Zachary's teacher put his poster, along with the other children's posters, up on the wall in the hallway outside of class. App. 5a, 73a. However, on a day when the teacher was absent, employees of the school removed Zachary's poster on the grounds that it had a religious theme. App. 5a, 73a. When Zachary's teacher returned and discovered what had been done, she was able to return the poster to the wall with the other children's artwork, but in a less prominent location. App. 6a, 11a-12a, 73a.

2. The District Court Proceedings

Mrs. Hood, on her son's behalf, brought an action under 42 U.S.C. § 1983 in the United States District Court for the District of New Jersey, seeking damages and injunctive relief under the Free Speech Clause of the First Amendment. App. 75a. The complaint set forth causes of action based on both the story incident and the poster incident. Mrs. Hood named as defendants the Medford Board of Education, Mr. Johnson, Ms. Pratt, Ms. Oliva, the New Jersey Department of Education and the New Jersey Commissioner of Education. App. 75a. Jurisdiction was based on 28 U.S.C. § 1331. Defendants answered and then moved under Fed. R. Civ. P. 12(c) for judgment on the pleadings. App. 75a.

On December 30, 1997, the district court (Rodriguez, J.) granted defendants' motion for judgment on the pleadings.

App. 100a. The court acknowledged that, even in non-public fora, regulations on speech "must be viewpoint-neutral and reasonably related to a legitimate governmental purpose." App. 90a. But the court thought that censoring the story from *The Beginner's Bible* simply because it was based on a biblical account was nevertheless a viewpoint-neutral act by defendants. The district court reasoned as follows:

> The plaintiffs note that the story [Zachary] chose was fairly innocuous, and claim that '[h]ad Plaintiff's book had a different cover and had the characters had names like Joe and Ed, it is beyond issue that the plaintiff would have been allowed to read his story to the class.' This is precisely true. [Zachary] was not allowed to read the book to his classmates during class time because it was The Bible, a religious book that constitutes the very foundation for a number of, but obviously not all, religions. It is irrelevant that the story had no overt religious theme; the speech was the book itself.

App. 93a-94a (citation, footnotes omitted). The court then explained what viewpoint discrimination *would* consist of: "Obviously, if [Zachary] was prohibited from reading the book solely because it was a Christian book while other students were allowed to read non-Christian religious books, this restriction would not have been viewpoint neutral." App. 94a. The court similarly held that the removal of the poster did not constitute viewpoint discrimination. App. 92a-93a.[1]

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[1]The court also rejected an argument that the censorship violated the Establishment Clause, dismissed claims by Mrs. Hood in her individual capacity, and dismissed claims against the New Jersey Department of Education as barred by the Eleventh Amendment (which the Court of Appeals found should have been disposed of by vacatur rather than dismissal).

3. *The Court of Appeals' First Panel Opinion*

On September 25, 1998, a unanimous panel[2] of the Third Circuit Court of Appeals affirmed the district court judgment in a three-paragraph memorandum opinion. App. 66a. The court agreed with the district court that state action that "foreclosed all material having a religious source or content, not just material having a Christian source or content" was viewpoint neutral. App. 67a-68a. Petitioner filed for rehearing or rehearing *en banc* on October 8, 1998. On April 16, 1999, the panel vacated its prior decision and ordered rehearing.

4. *The Court of Appeals' Second Panel Opinion*

On October 22, 1999, the same three-judge panel once again affirmed the decision of the district court, but on very different grounds. App. 40a. This time, the panel reversed its prior determination that the defendants had not engaged in viewpoint discrimination. Citing *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), and *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), the court now concluded:

> Plaintiff correctly points out that state policies that restrict expression of religious perspectives are not viewpoint neutral even where those policies apply

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Petitioner does not seek review in this Court of any of these determinations.

[2]The panel was composed of Circuit Judges Stapleton and Roth, and District Judge Longobardi, sitting by designation.

> equally to all religious perspectives. While such policies do not discriminate against any particular religious faith, they do discriminate against non-secular perspectives.

App. 47a. However, the panel then held that in the nonpublic forum of this classroom assignment, viewpoint discrimination was permissible if it was merely reasonable: "a viewpoint-based restriction on student speech in the classroom may be reasonably related to legitimate pedagogical concerns and thus permissible." App. 52a.

5. The Court of Appeals' En Banc *Opinion*

Petitioner again sought rehearing *en banc*, which was granted on December 1, 1999. On August 28, 2000, the *en banc* court issued its decision. Dividing six-to-six, it affirmed, by an equally divided court, the judgment of the district court on the claim regarding the censorship of Zachary's story "A Big Family":

> This en banc court finds itself equally divided on the issue of whether judgment was properly entered in favor of the defendants other than the Department of Education on the First Amendment claim arising from the first grade episode. Accordingly, we will affirm the District Court's judgments in favor of those defendants on that basis without further explication.

App. 4a.

On the claim regarding the earlier Thanksgiving poster incident, the court vacated the judgment of the district court and remanded "with instructions to provide C.H. an opportunity to amend the allegations of her complaint." App. 39a. The court found that the complaint failed to allege with sufficient

particularity that the named defendants had "participated in or approved the removal or restoration decisions" or that they "established or approved a policy, practice or custom causally related to" those decisions. App. 7a. Notably, the court gave no guidance to the district court with regard to the constitutional principles that will govern the poster claim on remand. Judge Alito, joined by Judge Mansmann, dissented, finding the treatment of the poster alleged in the complaint to be viewpoint discrimination, and would have held that:

> public school students have the right to express religious views in class discussion or in assigned work, provided that their expression falls within the scope of the discussion or the assignment and provided that the school's restriction on expression does not satisfy strict scrutiny. This conclusion follows from the following two propositions: first, even in a "closed forum," governmental "viewpoint discrimination" must satisfy strict scrutiny and, second, disfavoring speech because of its religious nature is viewpoint discrimination.

App. 26a-27a.

REASONS FOR GRANTING THE WRIT

This Court recently granted a petition for a writ of *certiorari* in *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502 (2d Cir. 2000), *cert. granted*, 121 S. Ct. 296 (Oct. 10, 2000) (No. 99-2036). That case presents the question whether excluding religion as a category of speech from a public school building after school hours is a viewpoint-based restriction on speech. The present petition deals with the same issue *during* school hours in the classroom context. *Good News Club*, which involves State discrimination between religious speech and other expressive activities "pertaining to the welfare of the community," presents only a portion of the broader contours of the problem with which the Courts of Appeals have struggled. The present case provides this Court with a helpful companion case to *Good News Club*. Toward that end, petitioner is prepared to meet any expedited briefing schedule this Court may order. Alternatively, petitioner respectfully requests that this Court hold this petition for disposition in light of its decision in *Good News Club*.

I. The Court of Appeals' Decision, and Those of Three Other Circuits, Conflict with the Decisions of This Court and the Decisions of the Seventh, Eighth, Tenth, and Eleventh Circuits.

The *en banc* court's division, six-to-six, in this case not only reveals its own puzzlement with the issues, but also adds to the confusion among the Courts of Appeals.

A. The Decision Below Conflicts with the Decisions of the Seventh, Eighth, Tenth, and Eleventh Circuits.

The Third Circuit's decision conflicts with decisions of the Seventh, Eighth, Tenth, and Eleventh Circuits regarding

how to treat categorical exclusions of religious speech.

In *Hedges v. Wauconda Comm. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993), the Seventh Circuit struck down a school policy prohibiting children from distributing literature "that is of a religious nature." *Id.* at 1296. The Seventh Circuit agreed that the discrimination was viewpoint based, notwithstanding the school's insistence that all religious materials were barred. Citing *Lamb's Chapel* (the case was pre-*Rosenberger),* the court held that "no arm of government may discriminate against religious speech when speech on other subjects is permitted in the same place at the same time." *Id.* at 1297. The court identified a clear distinction between excluding subject categories and discriminating against viewpoints: "Even when the government may forbid a category of speech outright, it may not discriminate on account of the speaker's viewpoint. Especially not on account of a religious subject matter, which the free exercise clause of the first amendment singles out for protection." *Id.* at 1298 (citation omitted). Thus, while the school could have barred the distribution of all non-school related printed materials that students wished to hand out, discriminating against non-school related printed material that a student wished to hand out simply because it was religious was viewpoint discrimination.[3]

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[3]The issue is not limited to the school context. In *Grossbaum v. Indianapolis-Marion Cy. Bldg. Auth.*, 63 F.3d 581 (7th Cir. 1995), the Seventh Circuit held that barring a rabbi from placing a menorah inside the lobby of a city building in which the city had permitted "a wide variety of public and private speakers" under a regulation that barred "religious displays and symbols" was viewpoint discrimination. *Id.* at 582-83. The Court rejected "the Building Authority's view [that] religion was a subject, not a viewpoint." *Id.* at 583.

Similarly, in *Good News/Good Sports Club v. School Dist. of the City of Ladue*, 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995), the court struck down as viewpoint discrimination a school district's use-of-premises policy that gave access to the Boy Scouts but excluded as "speech or activity involving religion or religious beliefs" the meetings of a group "that seeks to foster the moral development of junior high school students from the perspective of Christian religious values." *Id.* at 1502-03. The Eighth Circuit stressed that "the *Lamb's Chapel* Court refused to cabin religious speech into a separate excludible speech category; rather, the Court adopted a more expansive view, recognizing that a religious perspective can constitute a separate viewpoint on a wide variety of *seemingly* secular subject matter." *Id.* at 1506-07 (emphasis in original).[4]

In *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273 (10th Cir.), *cert. denied*, 519 U.S. 949 (1996), the Tenth Circuit struck down a community senior center's barring of the showing of a film about Jesus. The subject matter encompassed by the community center's access policy was quite broad, allowing outside groups to offer "classes and other activities if the subject matter is 'of interest to senior citizens.'" *Id.* at 1277. Despite the defendants' attempt to argue that the policy's bar on "sectarian instruction" and "religious worship" was an additional subject-matter restriction, the court found that "Any prohibition of sectarian instruction where other instruction is

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[4]In marked contrast, a Good News Club's activities were found by the Second Circuit to be "quintessentially religious" subject matter that was separate from the subject matter of "teaching moral values." *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 510 (2d Cir. 2000), *cert. granted*, 121 S. Ct. 296 (Oct. 10, 2000) (No. 99-2036). The Second Circuit decision is discussed at p. 13-14, *infra.*

permitted is inherently non-neutral with respect to viewpoint." *Id.* at 1279.

Finally, the Third Circuit decision also conflicts with *Chandler v. Siegelman*, Nos. 97-6898, 97-6953, 2000 WL 1557134 (11th Cir. Oct. 19, 2000) (reinstating opinion and judgment of *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), *cert. granted, vacated and remanded sub nom. Chandler v. Siegelman*, 120 S. Ct. 2714 (June 26, 2000)). In *Chandler*, the Eleventh Circuit vacated an overly broad district court injunction entered against a school system that the court found had engaged in various official actions that violated the Establishment Clause. The Eleventh Circuit held that the injunction barred not only official religious speech, but constitutionally protected student religious expression as well. 180 F.3d at 1257-58. Such restrictions, the court held, constituted viewpoint discrimination: "Suppression of religious speech constitutes viewpoint discrimination, the most egregious form of content-based censorship. [*Rosenberger.*] Government may not, therefore, censor religion from the content of students' protected speech at school." *Id.* at 1265.

The Seventh, Eighth, Tenth and Eleventh Circuits are thus in conflict with the Third Circuit.

B. Three Other Circuits Join the Court Below in Conflicting with the Seventh, Eighth, Tenth and Eleventh Circuits.

The Third Circuit's decision parallels those of the Second, Fifth, and Ninth Circuits, creating not merely a 6-6 split within the Third Circuit but a 4-4 split among the circuits.

In *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502 (2d Cir. 2000), *cert. granted*, 121 S. Ct. 296 (Oct. 10, 2000)

(No. 99-2036), currently pending before this Court, the Second Circuit upheld the exclusion of a Christian youth organization from school facilities under a use policy that broadly permitted "social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community" that are open to the general public and nonexclusive. *Id.* at 504. The Good News Club, which "develops children's moral values by using Bible stories, games, scripture, and songs," Petition for Certiorari at 4, No. 99-2036, was barred under a "religious purposes" exclusion to the access policy. 202 F.3d. at 504. The Second Circuit held that the Good News Club was not "simply teaching moral values," but was engaging in speech of a different subject matter entirely, religious instruction and worship. *Id.* at 510. The Second Circuit's focus on reflexively forcing religion into a *sui generis* category bears striking parallels to the approach of the court below in this case.

The Fifth Circuit, in *Campbell v. St. Tammany's Sch. Bd.*, 206 F.3d 482 (5th Cir. 2000), which upheld the exclusion of a prayer meeting from school facilities open to "civic, recreational and entertainment purposes that are open to the public and pertain to the 'welfare of the public,'" *id.* at 484, similarly cabined religious worship and instruction into a subject matter "distinct from a topical discussion." *Id.* at 487.

In *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1674 (2000), the Ninth Circuit upheld a school board's rejection of a billboard advertisement at a high school baseball field because the proposed advertisement contained the Ten Commandments. Rejecting the claim that banning the billboard was viewpoint-based discrimination against religious speech, the Court held it to be merely a permissible subject-matter exclusion. *Id.* at 969.

C. The Decision Below Conflicts with the Decisions of This Court in *Lamb's Chapel* and *Rosenberger*.

Ultimately, the Third Circuit's decision in this case also conflicts with this Court's decisions in *Lamb's Chapel* and *Rosenberger*. In *Lamb's Chapel*, this Court reversed the Second Circuit's conclusion that a school district's policy of excluding religious speech from after-hour uses of school facilities "was viewpoint neutral because it had been, and would be, applied in the same way to all uses of school property for religious purposes." 508 U.S. at 393. Rather, the Court held, "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Id.* This Court explicitly rejected the argument that "because the District had the power to permit or exclude certain subject matters, it was entitled to deny use for any religious purpose, including the purpose in this case." *Id.* at 396.

Then, in *Rosenberger*, this Court reaffirmed that *categorical* exclusion of religious viewpoints, and not merely the exclusion of *certain* religious viewpoints, constitutes viewpoint discrimination. The Court in *Rosenberger* specifically rejected the suggestion that *Lamb's Chapel* turned on discrimination against Christian perspectives: "The Court [in *Lamb's Chapel*] relied on no such distinction in holding that discriminating against religious speech was discriminating on the basis of viewpoint." *Id.* at 832. In sharp contrast, the court below in this case stated: "Obviously, if [Zachary] was prohibited from reading the book solely because it was a Christian book while other students were allowed to read non-Christian religious books, this restriction would not have been viewpoint neutral." App. 94a.

In this case, Zachary chose a story to share with the class as one of his favorites that satisfied all the general parameters that the children in the class were asked to meet. Had he been asked to bring in a story about American history, and he brought in "A Big Family," the story would not have been within the subject matter of the assignment and could have been barred on such grounds. Similarly, had he been asked to bring in a favorite story and he brought instead his favorite prayer, his proffered speech also would have been outside of the subject matter of the assignment.

Here, the assignment was simply to bring in a favorite story. Zachary did so. And his story's length, difficulty, and general subject matter (two brothers reconciling) were all indisputably within the range of what other children could choose as their favorites. Indeed, the court specifically found that a story identical to "A Big Family," but with differently named characters and drawn from a secular source, would have been permissible: "The plaintiffs . . . claim that '[h]ad Plaintiff's book had a different cover and had the characters had names like Joe and Ed, it is beyond issue that the plaintiff would have been allowed to read his story to the class.' This is precisely true." App. 93a (citation, footnotes omitted). But Zachary's story was nonetheless censored because it was from a religious source and featured characters with biblical names. This is irreconcilable with *Rosenberger* and *Lamb's Chapel*.[5]

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[5] Attorneys for petitioner are filing a brief *amicus curiae* in support of the petitioners in *Good News Club v. Milford Central School*, No. 99-2036, setting forth in detail our views on one aspect of the viewpoint discrimination issue. In that brief, we point out that when the State's justification for restricting private religious expression is based on perceived "endorsement of religion" concerns–as is the case both here and in *Good News Club*–such restrictions are necessarily based

II. The Present Case Is an Appropriate Vehicle for Resolving the Conflict Among the Circuits.

This case in its current posture is an appropriate vehicle to resolve the conflict of the circuits. The Court of Appeals was straightforward in its affirmance of the district court on the story-censorship claim: "The provision of the aforementioned judgment with respect to the claims against the remaining defendants arising from the events occurring during Z.H.'s first grade year is affirmed." App. 39a. Although the claim based on the poster incident the year before was remanded, the affirmance on the story claim is final. As this Court has stated, "finality is to be given a 'practical rather than a technical construction.'" *Gillespie v. United States Steel*, 379 U.S. 148, 152 (1964) (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). And this Court has frequently granted *certiorari* in similar situations where a petitioner sought review of claims affirmed by Courts of Appeals, even though other claims in the same case had been remanded to the district court. *See, e.g., Bogan v. Scott-Harris*, 523 U.S. 44 (1998); *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510 (1997).

Moreover, as a practical matter, this case provides a particularly appropriate vehicle for resolving the disagreement among the Circuits. Petitioner's claim that the censorship of his story was viewpoint discrimination was decided on the

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on viewpoint *when the State is not similarly concerned with being seen to "endorse" secular viewpoints*. It is impossible to "endorse" a subject matter; endorsement necessarily entails approval of one or several viewpoints on a subject (such as the view that one religion is the "true" religion, or that religion is better than irreligion).

pleadings. It thus presents this Court with a pure issue of law. This Court need only look at the facts as alleged in the complaint. *See National Metro. Bank v. United States*, 323 U.S. 454 (1945); WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1368. Those facts, moreover, center on a single, short children's story, reproduced in its entirety on p. 4 of this petition. The record, while succinct, is complete.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted or, in the alternative, should be held for disposition in light of this Court's decision in *Good News Club v. Milford Central School*, No. 99-2036.

Respectfully submitted,
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November, 2000

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Filed August 28, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-5061

C.H., AS GUARDIAN AD LITEM OF Z.H., A MINOR,
AND C.H., INDIVIDUALLY, Appellant
v.

GRACE OLIVA; GAIL PRATT; PATRICK JOHNSON;
MEDFORD TOWNSHIP BOARD OF EDUCATION;
LEO KLAGHOLTZ, Commissioner of Education;
THE STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

Appeal from the United States District Court
For the District of New Jersey
(D.C. Civil No. 96-cv-02768)
District Judge: Honorable Joseph H. Rodriguez

Argued June 2, 1999
BEFORE: STAPLETON and ROTH, Circuit Judges, and
LONGOBARDI,[1] District Judge

Reargued En Banc February 16, 2000
BEFORE: BECKER, Chief Judge, SLOVITER,
MANSMANN, GREENBERG, SCIRICA, NYGAARD,
ALITO, ROTH, MCKEE, RENDELL, BARRY and
STAPLETON, Circuit Judges

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[1] Honorable Joseph J. Longobardi, Senior United States District Judge for the District of Delaware, sitting by designation.

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OPINION OF THE COURT

STAPLETON, Circuit Judge:

C.H., as guardian ad litem of Z.H., appeals from an order of the District Court dismissing her complaint in this civil rights action. The complaint alleges that the First Amendment rights of Z.H., a minor, were violated on two occasions: once when he was a kindergarten student and once when he was in the first grade.[1] The District Court held, inter alia, that it had no jurisdiction over the defendant Department of Education of the State of New Jersey and that no constitutional violation occurred on either occasion. It entered judgment on the pleadings in favor of all of the defendants.

This en banc court finds itself equally divided on the issue of whether judgment was properly entered in favor of the defendants other than the Department of Education on the First Amendment claim arising from the first grade episode. Accordingly, we will affirm the District Court's judgments in favor of those defendants on that basis without further explication. While we agree with the District Court that the Department of Education is immune from suit in a federal court under the Eleventh Amendment, we will vacate the judgment in its favor and remand with instructions to dismiss the claims against it for lack of jurisdiction. With respect to the other defendants, we conclude that the complaint fails to state

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[1]The complaint purports to state claims under both the Free Speech Clause and the Establishment Clause of the First Amendment. Given our resolution of this appeal, it is unnecessary for us to distinguish in this opinion between the two theories of liability.

claims against them arising out of the kindergarten episode. We will remand, however, to give C.H. an opportunity to cure the deficiencies we have identified if she is able to do so.

I.

The following facts are affirmatively alleged in the complaint. In the Fall of 1994, Z.H. was a kindergarten student at the Haines Elementary School, a public school, in Medford, New Jersey. Defendant Pratt was the principal of that school; defendant Johnson was the Superintendent of Schools in the Medford School District; and defendant Medford Township Board of Education owned and operated the public schools in the District. Defendant Klagholtz was the Commissioner of Education of the State of New Jersey. He and defendant Department of Education of the State of New Jersey are alleged to be responsible for the general supervision of public education in the State. Defendant Oliva was to be Z.H.'s first grade teacher in the following year and was not involved in the relevant events in 1994.

In the spirit of the Thanksgiving holiday, Z.H.'s teacher asked the students to make posters depicting what they were "thankful for." Z.H. produced a poster indicating that he was thankful for Jesus. The allegations with respect to the remainder of the kindergarten episode are as follows:

> 13. Z.H.'s poster along with those of his classmates were subsequently placed on display in the hallway of the school. Subsequently, employees of Defendant, Township of Medford Board of Education, removed Z.H.'s poster because of its religious theme.

> 14. Said removal occurred on a day when Z.H.'s kindergarten teacher was absent. Upon her return, said teacher properly returned the poster to the hallway, although this time the poster was placed at a less prominent location at the end of said hallway.
>
> 15. Both Z.H. and C.H. were made aware of the removal of the poster because of its religious theme.

The removal is thus twice alleged to have been motivated by the religious theme of the poster, but that removal is alleged to have been done by unidentified "employees of Defendant." On the other hand, the restoration to a "less prominent location" is attributed to Z.H.'s teacher who is not joined as a defendant and who is not alleged to have acted because of the poster's religious theme. None of the defendants in the case is alleged to have participated in, or been aware of, the decision to remove the poster or to restore it to a "less prominent location."

II.

The Department of Education is a state agency and as such is immune from suit in a federal court without regard to the nature of the relief sought. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-101 (1984). Accordingly, we agree with the District Court that this suit could not go forward against the Department of Education. Having concluded that it was immune from suit under the Eleventh Amendment, however, it should have dismissed the claim against the Department for want of jurisdiction, rather than entering judgment in its favor.

See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996); *Wheeling & Lake Erie Ry. Co. v. Public Utility Comm'n*, 141 F.3d 88, 91 n.3 (3d Cir. 1998); *Sullivan v. Barnett*, 139 F.3d 158, 179 (3d Cir. 1998).

III.

It is, of course, well established that a defendant in a civil rights case cannot be held responsible for a constitutional violation which he or she neither participated in nor approved. *See Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1293 (3d Cir. 1997); *Baker v. Monroe Township*, 50 F.3d 1186, 1190 (3d Cir. 1995). There is no vicarious, *respondeat superior* liability under § 1983. *See Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978); *Hopp v. City of Pittsburgh*, 194 F.3d 434, 441 (3d Cir. 1999). Moreover, a school board can be held responsible for a constitutional violation of a teacher only if the violation occurred as a result of a policy, custom or practice established or approved by the board. *See Monell*, 436 U.S. at 694; *Woodwind Estates, Ltd. v. Gretkowski*, 205 F.3d 118, 126 (3d Cir. 2000); *Hopp*, 194 F.3d at 441.

As we have noted, there is no allegation that Oliva, Pratt, Johnson or the Board of Education participated in or approved the removal or restoration decisions and the Board of Education is not alleged to have established or approved any policy, custom or practice. Similarly, it is not alleged that the State Commissioner established or approved a policy, practice or custom causally related to the removal or restoration decisions. Rather the allegation as to the Commissioner is that he "failed to exercise [his] supervisory powers in a fashion which would protect the constitutional rights of students such as Z.H." (A.11).

As the District Court recognized, a state official who is acting in violation of the United States Constitution can be sued for prospective equitable relief. *See Ex parte Young*, 209 U.S. 123 (1908). A state official may be held responsible under § 1983 for exercising or failing to exercise supervisory authority, however, only if that official "has exhibited deliberate indifference to the plight of the person deprived." *Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir. 1989). Accordingly, a plaintiff asserting a failure to supervise claim must not only identify a specific supervisory practice that the defendant failed to employ, he or she must also allege "both (1) contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents, and (2) circumstances under which the supervisor's inaction could be found to have communicated a message of approval." *Bonenberger v. Plymouth Township*, 132 F.3d 20, 25 (3d Cir. 1997) (quoting *Colburn v. Upper Darby Township*, 838 F.2d 663, 673 (3d Cir. 1988)). Here the sole allegation against the Commissioner is that he failed to supervise in a way that would have prevented the alleged violation of Z.H.'s First Amendment rights. That is insufficient.

IV.

This is not a situation in which the complaint is merely lacking in factual detail. It is a situation in which the fair inference from the facts alleged is that the defendants did not play any role in the challenged decisions and there is no allegation, even conclusory, to the contrary. Accordingly, this is a situation in which it is very likely that the Court is being asked to resolve an important issue of constitutional law that is a purely hypothetical one as far as these parties are concerned.

While the removal is alleged to have been motivated by the religious theme of the poster, it is not alleged that the removal occurred as a result of any school policy against the exhibition of religious material. To the contrary, the affirmatively alleged prompt return of the poster to the display vouches for the absence of such a policy. Also noticeably absent from the complaint is any allegation that the restoration to "a less prominent place" was the result of a school policy or an authoritative directive from Principal Pratt or Superintendent Johnson. To the contrary, C.H.'s brief before the District Court indicates that there was no such policy or directive and that the placement was the product of an ad hoc "compromise" among peers. The brief explains C.H.'s understanding that Z.H.'s "kindergarten teacher on her own initiative returned the poster to public display, but ... as a compromise to those who were against any display of the poster, agreed to place it in a less prominent position." Plaintiff's Brief in Opposition at 1 n.2.

We decline to address the tendered constitutional issue under these circumstances. On the other hand, we acknowledge that the absence of allegations of participation was not pressed in support of the defendants' motion for judgment on the pleadings and that, if it had been, C.H. would undoubtedly have been given an opportunity to amend her complaint. Moreover, we cannot rule out the possibility that C.H. might be able to establish through amendment that an actual case or controversy exists between the parties. Under these circumstances, we conclude that the prudent course is to remand this case to the District Court with instructions to provide C.H. with an opportunity to amend. If she is unable to allege personal involvement in the kindergarten episode on the part of any of the defendants, the complaint should be

dismissed. If personal involvement is alleged, the District Court should conduct further proceedings consistent with this opinion.

We will vacate the judgment of the District Court entered in favor of the Department of Education and will remand with instructions to dismiss the complaint against it for want of jurisdiction. We will affirm the judgment of the District Court with respect to the claims against the remaining defendants arising from the events occurring during Z.H.'s first grade year. We will vacate the judgment of the District Court with respect to the remaining claims and will remand with instructions to provide C.H. an opportunity to amend the allegations of her complaint concerning them.

ALITO, *Circuit Judge*, with whom MANSMANN, *Circuit Judge*, joins, dissenting:

In accordance with tradition, I will not comment on the decision of the en banc court insofar as it affirms, by an equally divided vote, the judgment of the District Court regarding Zachary Hood's[1] wish to read the story, "A Big Family," to his class. I must write, however, regarding the full court's decision with respect to Zachary's Thanksgiving poster. Instead of confronting the First Amendment issue that is squarely presented by that incident, the court ducks the issue and bases its decision on a spurious procedural ground never raised by the defendants--*viz.*, that the complaint does not adequately allege facts providing a basis for holding any of the defendants responsible for the treatment of the poster. I dissent.

I.

The incident concerning the Thanksgiving poster occurred when Zachary was in kindergarten at the Haines Elementary School in Medford, New Jersey. As alleged in the complaint, this is what happened. With Thanksgiving approaching, Zachary's teacher told the students to make posters depicting what they were "thankful for." Zachary drew a picture of Jesus. All of the pupils' posters, including Zachary's, were initially hung in the hallway of the school, but on a day when Zachary's teacher was absent, unnamed employees of the school board removed the poster "because of its religious theme." The next day,

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[1]Although the complaint identified Zachary and his mother, Carol Hood, by initials, rather than by name, their names are used in the plaintiff's most recent brief, and I therefore use them in this opinion.

Zachary's teacher put the picture back on the wall--but this time in a less prominent spot at the end of the hall.

The following year another, similar incident occurred while Zachary was in Grace Oliva's first-grade class at the same school. As a reward for achieving a certain degree of proficiency in reading, Ms. Oliva invited students to bring in a book to read to the class. "The only condition on the selection was that it would be reviewed first by [Ms. Oliva] to insure that its length [and] complexity were appropriate for the first grade." Zachary qualified to read a story to the class and brought to school a book entitled *The Beginner's Bible: Timeless Children's Stories*. Zachary wanted to read the following story, called "A Big Family," which represents an adaptation of the story of the reconciliation of Jacob and Esau from Genesis 29:1-33:20:

> Jacob traveled far away to his uncle's house. He worked for his uncle taking care of sheep. While he was there, Jacob got married. He had twelve sons. Jacob's big family lived on his uncle's land for many years. But Jacob wanted to go back home. One day, Jacob packed up all his animals and his family and everything he had. They traveled all the way back home to where Esau lived. Now Jacob was afraid that Esau might still be angry at him. So he sent presents to Esau. He sent servants who said, "Please don't be angry anymore." But Esau wasn't angry. He ran to Jacob. He hugged and kissed him. He was happy to see his brother again.

Ms. Oliva told Zachary that he could not read this story to the class "because of its religious content."

Instead, she permitted Zachary to read the story to her in private. Other students, however, were allowed to read their favorite stories to the class.

Upon learning of this incident, Zachary's mother, Carol Hood, spoke with Ms. Oliva, who informed her that Zachary could not read the story to the class "because it might influence other students." Ms. Hood next spoke with Gail Pratt, the school principal, who said that reading the story "was the equivalent of 'praying'." Noting that she had received complaints in the past, Ms. Pratt stated that the story "might upset Muslim, Hindu or Jewish students." She added that there was "no place in the public school for the reading of the Bible" and advised: " '[M]aybe you should consider taking your child out of public school, since you don't appear to be public school material.' " Ms. Pratt noted that "her position was fully supported by various legal authorities." Ms. Hood made an appointment to speak again with Zachary's teacher, but she did not appear. Ms. Hood's lawyer then contacted Patrick Johnson, the school superintendent, and demanded that Zachary be allowed to read the story to the class and that Ms. Pratt apologize for her conduct. The superintendent did not respond.

Ms. Hood, in her individual capacity and as Zachary's guardian ad litem, filed a two-count complaint in federal district court. Count I alleged that Ms. Oliva, Ms. Pratt, Mr. Johnson, and the Medford Board of Education (hereinafter collectively "the Medford defendants") had violated Zachary's constitutional right to freedom of expression. Count II alleged that the New Jersey Commissioner of Education and the New Jersey Department of Education had aided in this violation. Count II sought an order requiring the state to implement

policies to protect students who wish to engage in the expression of religious views.

The defendants moved for judgment on the pleadings. In light of the putative pleading defect on which the full court now relies in relation to the poster incident, it is important to note the basis for the Medford defendants' motion. The Medford defendants did not argue that there were any formal defects in the complaint, and they certainly did not suggest that the claim concerning the poster should be dismissed because it did not state a basis for holding them responsible for the treatment of the poster. On the contrary, the Medford defendants acknowledged that judgment on the pleadings would be proper only if "the plaintiff could prove no set of facts which would entitle [her] to relief." Brief in Support of Rule 12(c) Motion for Judgment on Pleadings on Behalf of Defendants Medford Township Board of Education, Grace Oliva, Gail Pratt and Patrick Johnson. They also acknowledged, for purposes of the motion, that they were responsible for the removal and replacement of the poster, and they argued that their conduct was fully justified. They stated:

> For purposes of the instant motion only, defendants do not dispute plaintiff's contention that the temporary removal and subsequent relocation of plaintiff's poster was related to the poster's religious theme.

Id. at 19. They continued:

> *[D]efendants* merely *relocated the poster* to another location in the same hallway. Plaintiff cannot reasonably contend that *defendants*

> inhibited religion by *temporarily removing the poster and subsequently relocating it* to another location in the same hallway.

Id. at 20 (emphasis added). In their reply brief in support of their motion, the Medford defendants stated:

> *[T]he Medford Defendants' temporary removal and almost immediate return* of the poster to the hallway wall supports the inescapable conclusion that no such hostility existed.

Medford Defendant's 12(c) Reply Br. at 5 (emphasis added).

In granting the defendants' motion for judgment on the pleadings, the District Court did not rely upon--or even note--any formal defect in the complaint. On the contrary, like the Medford defendants themselves, the District Court accepted the fact that the Medford defendants were responsible for the removal of the poster and its relocation to a less conspicuous spot. The District Court stated:

> The Medford defendants concede that the poster was removed and relocated because it had a religious theme.

C.H. v. Oliva, 990 F. Supp. 341, 354 (D.N.J. 1997). However, the Court held that the Medford defendants did not violate Zachary's right to freedom of expression because "relocating the poster of Jesus ... [was] reasonably related to legitimate pedagogical concerns." *Id.* at 353.

On appeal, the Medford defendants took the same approach that they had in the District Court. They did not assert that there were any formal defects in the complaint, and they did not dispute, for purposes of the appeal, that they were responsible for the treatment of the poster. Rather, they argued that their removal and relocation of the poster were constitutional. The thrust of their argument was as follows:

> The educators of Z.H.'s school were correctly concerned about the impact of the prominent display of Z.H.'s poster upon their young students. Students of a non-Christian faith may have felt that the prominent display of the poster constituted a comment by the school on the correctness of Christianity or an endorsement of the Christian religion. These children may also have felt the prominent display of the poster to be a negative comment on their own religious beliefs. The Medford defendants should not be liable . . . for their concerns about the impact of Z.H.'s poster on his fellow classmates.

Medford Appellees' Br. at 14.

Both of the opinions issued by the panel before rehearing en banc was granted affirmed the District Court on the merits; neither was based upon--or even hinted at--any formal defects in the complaint. The first opinion was unpublished and disposed of the claims relating to "A Big Family" and the poster in less than two full typewritten pages. After the plaintiffs petitioned for rehearing en banc, the panel granted rehearing and issued a for-publication opinion. *C.H. v. Oliva*, 195 F.3d 167 (3d Cir. 1999). Like the Medford defendants' brief, this opinion did not dispute

that the Medford defendants were responsible for the removal and relocation of the poster to a less prominent spot. The opinion stated that "the issue to be resolved is whether the school's decision to temporarily remove Z.H.'s poster was reasonably related to a legitimate pedagogical concern." *Id.* at 175. In striking contrast with the position taken in the opinion of the en banc court, the panel opinion never disputed that the Medford defendants were responsible for the treatment of the poster. Indeed, the for-publication panel opinion deferred to the professional judgment of the school officials that the temporary removal of the poster was appropriate for pedagogical reasons! The panel wrote:

> Given the sensitivity of the issues raised by student religious expression, coupled with the notable immaturity of the students involved and the relatively public display of the posters in the school hallway, *the school's temporary removal* of the poster does not violate the First Amendment rights of the student artist. As we have indicated, decisions on issues of this kind necessarily involve *fact-sensitive exercises of discretion by school authorities* and reservation of a brief period for deliberation is thus a measure reasonably related to legitimate pedagogical concerns.

Id. (emphasis added). Plainly, the panel could not have deferred to the professional judgment of the school authorities if, as the full court now believes, the complaint does not even allege that those officials had any role in the poster's removal.

The for-publication panel opinion took a similar approach with respect to the relocation of the poster to a

less prominent spot. The panel observed: "We decline plaintiff's invitation to require the District Court to review and regulate *the school's placement of its students' artwork*." *Id.* at 176 n.3 (emphasis added).

Following the issuance of this panel decision, the court granted rehearing en banc and permitted the parties to submit supplemental briefs. Once again, the Medford defendants did *not* contend that the District Court's decision regarding the poster should be affirmed on the ground that the complaint did not adequately allege that they were responsible for the poster's treatment. On the contrary, they defended the treatment of the poster on the merits, arguing as follows:

> Z.H. did not have any particular right to have his poster displayed in a prominent location and a prominent display of the poster may have the impermissible effect of conveying a message of endorsement of Christianity. The Medford Defendant's (sic) actions were thus reasonably related to legitimate pedagogical concerns, namely the concern that their young charges might have construed . . . the prominent display of Z.H.'s poster as the school's approval of Z.H.'s religion.

Medford Appellees' Supplemental Br. at 9.

The en banc court heard extensive oral argument. Not one word was mentioned about the supposed failure of the complaint to plead in sufficient detail the basis for holding the Medford defendants liable for the removal and relocation of the poster.

Despite all this, the full court sua sponte raises the issue of the adequacy of the complaint and, without even permitting the plaintiff to comment on this new issue, the court declines to reach the merits of the appeal and instead remands the case so that the plaintiff can seek to amend the complaint.

II.

A. Under the liberal pleading regime of the Federal Rules of Civil Procedure, the existing complaint is adequate. Under Fed. R. Civ. P. 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and under Fed. R. Civ. P. 8(f), "[a]ll pleadings shall be construed as to do substantial justice." A complaint must only give "fair notice of what the plaintiff's claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47 (1957). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46; *see also Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).[2]

> [P]leadings under the rules simply may be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon, to provide some guidance as to what was decided for purposes of res judicata, and to indicate whether the case should be tried to the court or to a

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[2]This same principle governs a motion under Rule 12(c). 5A C. Wright & A. Miller, Federal Practice and Procedure § 1368 at 494-95 & n.34 (2000 Supp.) (citing cases).

> jury. No more is demanded of the pleadings than this.

5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1202 at 69-70 (1969) (footnote omitted).

Under these standards, the complaint in this case adequately avers a basis for holding the Medford defendants responsible for the treatment of the poster, *i.e.*, its temporary removal and subsequent relocation to a less conspicuous place in the hall. While I think that the complaint adequately asserts a claim against all of the Medford defendants, I will focus on one defendant, Gail Pratt, the school principal. I do this because the sufficiency of the complaint with respect to her is clear and because, if that is so, the court must confront the merits of the plaintiff's First Amendment claim whether or not the allegations pertaining to the other defendants are also adequate.

The complaint in this case alleges that "employees of Defendant, Township of Medford Board of Education, removed [Zachary's] poster because of its religious theme" on a day when Zachary's regular teacher was not present. The complaint also alleges that the next day Zachary's teacher put the poster back up on the wall, but in a less conspicuous spot at the end of the hall. Furthermore, the complaint avers facts from which it may be reasonably inferred that Pratt had received complaints about religious expression in the school (*see* Complaint para. 21), had consulted "legal authorities" regarding the issue (*id.*), and had developed a "position" that was not receptive to such expression. *Id.* (" '[M]aybe you [Carol Hood] should consider taking your child out of public school, since you don't appear to be public school material.' "). In view of

these allegations, it cannot be said "beyond doubt that the plaintiff can prove no set of facts in support of h[er] claim which would entitle h[er] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Pratt could be held responsible if she directed that the poster be treated as it was or if they knew about and acquiesced in the treatment. *See, e.g., Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1293 (3d Cir. 1997); *Baker v. Monroe Twp.*, 50 F.3d 1186, 1190-91 (3d Cir. 1995). Pratt is portrayed in the complaint as a person with a strong and well-developed "position" about religious expression in her school. A poster of Jesus was put up in the hall of her elementary school by one of the teachers under her supervision. On a day when this teacher was away, the poster was taken down because of its religious content by unidentified school board employees. Then the next day, the regular teacher, having regained possession of the poster, put it back on the wall, but in a less noticeable spot than the one she had initially selected. Under modern pleading rules, these allegations are surely sufficient to assert a claim that Pratt knew about and acquiesced in these sensitive events that went on over a period of days in her own school and that most likely occasioned discussion and, perhaps, controversy. Pratt's papers in the District Court and on appeal make it clear that she well understood the claim that was asserted against her, and for purposes of her motion for judgment on the pleadings, she did not dispute her involvement. Thus, the complaint adequately asserted a claim against her.

B. But even if it did not, why should our court sitting en banc reach this pleading issue? The defendants did not move to dismiss the complaint based on a pleading defect. The District Court did not dismiss the complaint on such a

ground. The defendants did not raise any pleading issue on appeal. "We do not generally consider issues not raised by the parties," *Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807, 812 (3d Cir. 1991) (en banc), and there is no good reason for us to raise a pleading issue sua sponte in this case. The only result of the court's approach is likely to be delay, expense for the parties, and a waste of judicial resources.

On remand, the plaintiff will be able to cure the putative defect in the complaint simply by alleging that Pratt knew about and acquiesced in the treatment of the poster and by specifying that this allegation is "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. Proc. 11(b)(4). Based solely on the facts already recited in the complaint, such an allegation would unquestionably be proper.

If the plaintiff amends the complaint by adding such an allegation, the District Court will have no basis for dismissing the complaint on a pleading ground, and thus the District Court will be required once again to decide whether the complaint states a valid First Amendment claim. The District Court has already ruled on this question, and since our Court's disposition of the current appeal provides no new guidance, the District Court will presumably adhere to its prior reasoning. The plaintiff will then be able to appeal, and the precise issue that the full court now avoids will be b[illegible]. I see no reason for this wasteful procedure.

The Court justifies its approach as follows. According to the Court, "[t]his is not a situation in which the complaint is merely lacking in factual detail." Maj. Op. at

202. "It is a situation in which the fair inference from the facts alleged is that the defendants did not play any role in the challenged decisions and there is no allegation, even conclusory, to the contrary." *Id.* Apparently it is the Court's belief that, on remand, the plaintiff will "very likely" be unwilling to allege that Pratt knew about and acquiesced in the treatment of the poster and that the claim regarding the poster will be dismissed. This is what I understand the Court to mean when it writes that "it is very likely that the Court is being asked to resolve an important issue of constitutional law that is a purely hypothetical one as far as these parties are concerned." *Id.* I find the Court's discussion baffling.

As previously noted, if the plaintiff and her attorneys know no more about the treatment of the poster than is already alleged in the complaint, they have a more than adequate basis for adding the allegation needed to satisfy the Court's concern. The Court seems to think, however, that Pratt in fact did not know about and acquiesce in the treatment of the poster, that the plaintiff and/or her attorneys know this, and that they will accordingly be unwilling to allege that Pratt was involved.

Nothing in the record supports the Court's apparent belief, and there is much that points in the other direction. As noted, Pratt has not claimed that she lacked responsibility for the treatment of the poster. Moreover, since the plaintiff's attorneys are presumably familiar with the legal standard for holding Pratt responsible, and since they have vigorously litigated the claim against her in the District Court and on appeal, they presumably are not aware of facts showing that Pratt had no involvement in the incident.

In support of its curious view, the Court cites a footnote in a brief submitted by the plaintiff to the District Court. The footnote states in pertinent part:

> Although not specifically stated in the pleadings, Plaintiffs will be prepared to show, if this matter proceeds to trial, that the kindergarten teacher was of the view that the poster in question was an extremely appropriate response to the assignment, that in part because of how well the poster had been done, it was given a prominent location next to the door of the kindergarten room, and that the kindergarten teacher on her own initiative returned the poster to public display, but that as a compromise to *those who were against any display of the poster*, agreed to place it in a less prominent position.

Plaintiff's Brief in Opposition to Rule 12(c) Motion at 1 n.2 (emphasis added).

Nothing in this passage suggests that the plaintiff will be unwilling to allege that Pratt knew about and acquiesced in the allegedly discriminatory removal and relocation of the poster. The passage says nothing whatsoever about the removal of the poster. As for the replacement of the poster in a less conspicuous spot, while the passage does say that the new location "was a compromise to those who were against any display of the poster," the passage does not reveal who these opponents were. Pratt might have been one of them. She might have insisted that the poster be re-hung, if at all, in a less noticeable spot. Or, faced with a dispute among her teachers, she might have brokered a compromise to that effect. In either event, if she knew about and acquiesced in

the discriminatory treatment of the poster because of its religious theme, she could be held responsible.

If the Court seriously believes that the plaintiff will be unwilling on remand to make the necessary allegation, the Court could ask the plaintiff's attorneys to proffer the amendment that they would make. The Court, however, has refused to take that step. The Court simply does not want to confront Zachary's First Amendment claim. Whatever the Court thinks about the validity or importance of that claim, however, it is entitled to be treated in accordance with the same procedural rules that we apply to the claims of other litigants.

III.

A. I will therefore address the issue that the en banc court evades: whether Zachary's constitutional right to freedom of expression was violated if, as the complaint alleges, his poster was given less favorable treatment than it would have received had its content been secular rather than religious.[3]

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[3]The issue here is not, as the District Court thought, whether Zachary had a "constitutional right to have the poster of Jesus displayed in any particular location" or to have it "displayed prominently" in the school. *C.H. v. Oliva*, 990 F. Supp. at 353, 355. The issue is whether he was entitled to nondiscriminatory treatment. Nor is the issue, as the panel suggested, whether the defendants were entitled to remove the poster for "a brief period of deliberation." *C.H. v. Oliva*, 195 F.3d at 175. Nowhere in the complaint--or for that matter in the answer--is it alleged that the poster was removed for this reason.

I would hold that discriminatory treatment of the poster because of its "religious theme" would violate the First Amendment. Specifically, I would hold that public school students have the right to express religious views in class discussion or in assigned work, provided that their

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Nor, at this stage, is the question whether Zachary actually "suffered any compensable damages." Br. Amicus Curiae of the American Jewish Congress, Anti-Defamation League and Americans United for Separation of Church and State ("Amicus Br.") at 2. This case never progressed beyond the pleading stage. The complaint alleged that Zachary suffered emotional distress and anguish as a result of the defendants' actions, Complaint para. 27, and for now, that allegation is enough. Nor is the issue whether injunctive relief would be appropriate if a constitutional violation is ultimately found. *See* Amicus Br. at 4-5. At this stage it is sufficient that the complaint states a live claim for some form of relief--and it clearly does.

Nor is the issue whether Pratt or Johnson is entitled to qualified immunity. Although this argument was asserted in the Medford defendants' supplemental appellate brief, it was not raised in the district court in their motion for judgment on the pleadings, and it was not addressed by the district court. Under these circumstances, I would not reach the issue now. Moreover, even if we were to entertain the qualified immunity argument at this time, we would still be required, as the first step of our analysis, to decide whether the complaint stated a First Amendment claim. *Siegert v. Gilley*, 500 U.S. 226, 231 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1982). And of course the qualified immunity defense would not apply to the school board in its official capacity. *Owen v. City of Independence*, 445 U.S. 622, 639-650 (1980).

expression falls within the scope of the discussion or the assignment and provided that the school's restriction on expression does not satisfy strict scrutiny. This conclusion follows from the following two propositions: first, even in a "closed forum," governmental "viewpoint discrimination" must satisfy strict scrutiny and, second, disfavoring speech because of its religious nature is viewpoint discrimination.

B. Public schools are government property, and "the Government 'no less than the private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.' " *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 800 (1985) (quoting *Greer v. Spock*, 424 U.S. 828, 836 (1976)). The Supreme Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Id.* Consequently, government's ability to regulate speech on its own property often varies depending on the particular "forum" involved. In a "nonpublic forum," government may regulate expression much more extensively than in a "public forum," whether "traditional" or "dedicated." *See, e.g., Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 54 (1983); *Brody v. Spang*, 957 F.2d 1108, 1117 (3d Cir. 1992). Even in a nonpublic forum, however, where the greatest restrictions are permissible, "viewpoint discrimination" is not allowed unless it passes the highest scrutiny. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394-95 (1993); *Cornelius*, 473 U.S. at 800; *Perry Education Ass'n*, 460 U.S. at 46; *Widmar v. Vincent*, 454 U.S. 263

(1981); *Brody*, 957 F.2d at 1117.[4] As Justice Brennan put it in *Perry*: "Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.' " *Perry Education Assn*, 460 U.S. at 62 (Brennan, J., dissenting). Indeed, even when government is regulating a category of speech, such as "fighting words," that could be entirely prohibited, government may not discriminate based on viewpoint. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-96 (1992).

C. The Supreme Court has made it clear that discrimination based on the religious character of speech is viewpoint discrimination. In *Lamb's Chapel*, the Court struck down a school district policy that permitted school facilities to be used after school hours by a wide variety of groups but prohibited the use of those facilities by a group

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[4]There is some support in Supreme Court opinions for the proposition that viewpoint-based restrictions are per se unconstitutional, *see, e.g., City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984), but other cases show that strict scrutiny applies. See, *e.g., R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 392-94 (1992) (applying strict scrutiny to a regulation banning "fighting words"); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760-761 (1995) (plurality) (applying strict scrutiny to a restriction on religious advocacy); *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (applying strict scrutiny to a law barring flag desecration); *See also* Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pa. L. Rev. 2417, 2425 n.44 (1996)

that wished to show a film series addressing various child-rearing issues from a "Christian perspective." The Court held that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject from a religious standpoint." 508 U.S. at 393-94. Likewise, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), the Court examined university guidelines that refused to allow a student publication, "Wide Awake," to benefit from the "Student Activities Fund" because the publication reflected a religious perspective. It held that such guidelines violated the First Amendment because they discriminated against otherwise permissible speech on the basis of viewpoint. The Court wrote:

> It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history. We conclude, nonetheless, that here, as in Lamb's Chapel, viewpoint discrimination is the proper way to interpret the University's objections to Wide Awake.

515 U.S. at 831.

Accordingly, viewpoint discrimination is prohibited even in a nonpublic forum if strict scrutiny cannot be satisfied, and discrimination based on the religious content of speech is viewpoint discrimination. It follows that

public school authorities may not discriminate against student speech based on its religious content if the discrimination cannot pass strict scrutiny.

D. Recognition of this important principle would not interfere with the operation of the public schools or impinge upon the rights of other students. Public school teachers have the authority to specify the subjects that students may discuss in class and the subjects of assignments that students are asked to complete. *See, e.g. Cornelius*, 473 U.S. at 806 (subject matter may be restricted in nonpublic forum); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974) (same); *Brody*, 957 F.2d at 1117 (same). Thus, if a student is asked to solve a problem in mathematics or to write an essay on a great American poet, the student clearly does not have a right to speak or write about the Bible instead.

Public school teachers may also enforce viewpoint-neutral rules concerning such matters as the length of an oral presentation or written assignment. *See Brody*, 957 F.2d at 1117 (reasonable time, place, and manner restrictions allowed in nonpublic forum). If a paper is limited to 20 pages, the school obviously may insist that all students, including any who wish to express a religious viewpoint, adhere to that rule.

In the public schools, low-value speech, such as vulgar and offensive language, may be restricted to a greater extent than would otherwise be permissible. As the Court observed in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986), "[s]urely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." " '[T]he First Amendment gives a high school student the

classroom right to wear Tinker's armband, but not Cohen's jacket .' " *Id.* at 682 (citation omitted).

Finally, a public school may even restrict speech based on viewpoint if it can show a compelling interest for doing so. In *Tinker*, the Court stated: "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." 393 U.S. at 511. Later, the Court observed that "conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513. Therefore, if the expression of a particular religious viewpoint, such as one espousing racial hatred, creates a sufficient threat, school authorities may intervene.

Taken together, these constitutionally permissible ways of regulating student speech provide ample means of ensuring that student expression does not interfere with the effective operation of the schools or cause harm to other students. School authorities are not permitted to discriminate against student expression simply because of its religious character.

E. When these principles are applied to the present case, it is clear that the judgment of the District Court must be reversed. Taking down Zachary's Thanksgiving poster and replacing it in a less conspicuous location because of its religious content was plainly viewpoint, not subject matter, discrimination. The subject matter of the poster was specified by Zachary's teacher: something for

which he was thankful as the Thanksgiving holiday approached. His poster fell within the specified subject matter, and it is not alleged that the poster was subjected to discriminatory treatment because of that subject. Rather, the poster was allegedly given discriminatory treatment because of the viewpoint that it expressed, because it expressed thanks for Jesus, rather than for some secular thing. This was quintessential viewpoint discrimination, and it was proscribed by the First Amendment unless the Medford defendants can show that allowing Zachary's poster to be displayed with his classmates' on a non-discriminatory basis would have "materially disrupt[ed] classwork or involve[d] substantial disorder or invasion of the rights of other[ ] [students]." *Tinker*, 393 U.S. at 513.

No such showing is evident from the pleadings, and nothing asserted in the Medford defendants' briefs suggests that they could make such a showing on remand. The Medford defendants contend that the treatment of Zachary's poster furthered the compelling interest of avoiding an Establishment Clause violation. *See* Medford Defendants' Supplemental Br. at 27-31. It is clear, however, that displaying Zachary's poster would not have violated the Establishment Clause. The Establishment Clause is not violated when the government treats religious speech and other speech equally and a reasonable observer would not view the government practice as endorsing religion. *Capitol Square*, 515 U.S. at 763-70 (1995) (plurality); *id.* at 777 (O'Connor, J., concurring in part and concurring in the judgment). See also *Santa Fe Independent School District v. Doe*, 120 S. Ct. 2266, 2278 (2000).

Here, a reasonable observer would not have viewed the exhibition of Zachary's Thanksgiving poster along with the secular posters of his classmates as an effort by the school to endorse religion in general or Christianity in particular. An art display that includes works of religious art is not generally interpreted as an expression of religious belief by the entity responsible for the display. Even the amici supporting the defendants acknowledge that "[d]isplay of student artwork with religious themes is understood to be the personal expression of the student and not that of the school." Brief Amicus Curiae of the American Jewish Congress, Anti-Defamation League and Americans United for Separation of Church and State at 1. Furthermore, if there had been any danger that anyone might have reasonably interpreted the display of Zachary's poster in the hall as an effort by the school to endorse Christianity or religion, the school could have posted a sign explaining that the children themselves had decided what to draw. *See Capitol Square Review*, 515 U.S. at 793-94 (Souter, J., concurring in the judgment).

For these reasons, I see no indication in the briefs that the Medford defendants had a compelling reason for treating Zachary's Poster in the manner alleged. Zachary's teacher in effect asked him a question: What are you thankful for as Thanksgiving approaches? Zachary was entitled to give what he thought was the best answer. He was entitled to be free from pressure to give an answer thought by the Medford educators to be suitable for a boy who is "public school material." Complaint para. 21.

F. In affirming the judgment of the district court, the panel took the position that a public school is free to practice viewpoint discrimination in regulating student speech in class and in assignments, provided only that the

discrimination is "reasonably related to a legitimate pedagogical concern." 195 F.3d at 170-72. Moreover, the panel held that avoiding the possibility of "resentment" by parents is a legitimate pedagogical concern. *Id.* at 175. According to the panel, then, if public school authorities could reasonably think that a student's expression of a particular viewpoint in a class discussion or assignment could cause "resentment" on the part of other students or parents, the school may censor the student's speech.

The panel's view is radically at odds with fundamental First Amendment principles. As previously discussed, viewpoint discrimination strikes at the heart of the freedom of expression. And in order to restrict core First Amendment speech, much more is needed than the possibility that the speech may cause resentment. *See Texas v. Johnson*, 491 U.S. at 407-10. This principle applies to speech in public schools. As the Supreme Court wrote in *Tinker*, "[a]ny word spoken in class . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says that we must take this risk." *Tinker*, 393 U.S. at 737. Thus, "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 738.

The panel's understanding of the First Amendment principles applicable in this case was based on one case--*Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). *See* 195 F.3d at 171-74. The panel viewed *Hazelwood* as providing the governing standard for "student expression that is part of a school curriculum,"

see 195 F.3d at 171, including things that students say (or express by other means, such as artwork) when they are called upon by their teachers to express their own thoughts or views. This is an incorrect interpretation of *Hazelwood*. *Hazelwood* involved a high school principal's censorship of articles in the school newspaper. The Court described the issue before it as concerning "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." 484 U.S. at 271. The Court held that educators may regulate such activities "so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. While *Hazelwood* certainly applies to many things that occur in the classroom--such as work on the school newspaper at issue in that case (*see* 484 U.S. at 268)--nothing in *Hazelwood* suggests that its standard applies when a student is called upon to express his or her personal views in class or in an assignment.

On the contrary, *Hazelwood* governs only those expressive activities that might reasonably be perceived "to bear the imprimatur of the school." 484 U.S. at 271. This understanding of *Hazelwood* is fortified by *Rosenberger*, where the Court wrote:

> A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the *University's own speech*, which is controlled by different principles. *See e.g.*, . . . *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270-272.

515 U.S. at 834 (emphasis added).

Things that students express in class or in assignments when called upon to express their own views do not "bear the imprimatur of the school" *Hazelwood*, 484 U.S. at 271, and do not represent "the [school's] own speech." *Rosenberger*, 515 U.S. at 834. "The proposition that schools do not endorse everything that they fail to censor is not complicated." *Westside Community Bd. v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'Connor, J.).

In the present case, for reasons already discussed, reasonable students, parents, and members of the public would not have perceived Zachary's poster as bearing the imprimatur of the school or as an expression of the school's own viewpoint. Thus, it is abundantly clear that *Hazelwood* has no application here.

If the panel's understanding of *Hazelwood* were correct, it would lead to disturbing results. Public school students--including high school students, since *Hazelwood* was a high school case--when called upon in class to express their views on important subjects, could be prevented from expressing any views that school officials could reasonably believe would cause "resentment" by other students or their parents. If this represented a correct interpretation of the First Amendment, the school officials in *Tinker* could have permitted students, as part of a class discussion, to express views in favor of, but not against, the war in Vietnam because some students plainly resented the expression of antiwar views. *See* 393 U.S. at 509 n.3. Today, school officials could permit students to express views on only one side of other currently controversial issues if the banned expression would cause resentment by some in the school, as it very likely would.

Such a regime is antithetical to the First Amendment and the form of self-government that it was intended to foster.

IV.

In sum, I would hold that the District Court erred in granting judgment for the defendants. I would reverse and remand for a determination whether the Medford defendants did in fact treat Zachary's poster in a discriminatory fashion because of its religious content. And if discriminatory treatment is shown, I would give the Medford defendants the opportunity to show that their actions were supported by a compelling reason and were narrowly tailored to serve that end.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-5061

C.H., AS GUARDIAN AD LITEM OF Z.H., A MINOR
AND C.H. INDIVIDUALLY, Appellant

v.

GRACE OLIVA; GAIL PRATT; PATRICK JOHNSON;
MEDFORD TOWNSHIP BOARD OF EDUCATION;
LEO KLAGHOLTZ, Commissioner of Education;
THE STATE OF NEW JERSEY DEPARTMENT OF
EDUCATION

Appeal from the United States District Court
For the District of New Jersey
(D.C. Civil No. 96-cv-02768)
District Judge: Honorable Joseph H. Rodriguez

Argued June 2, 1999
BEFORE: STAPLETON and ROTH, Circuit Judges, and
LONGOBARDI,* District Judge

Reargued En Banc February 16, 2000
BEFORE: BECKER, Chief Judge, SLOVITER,
MANSMANN, GREENBERG, SIRICA, NYGAARD,
ALITO, ROTH, MCKEE, RENDELL, BARRY and
STAPLETON, Circuit Judges

*Honorable Joseph J. Longobardi, Senior United States District Judge for the District of Delaware, sitting by designation.

JUDGMENT

This cause came on to be heard on the record before the United States District Court for the District of New Jersey and was argued before this Court on February 16, 2000.

On consideration whereof, it is

ORDERED and ADJUDGED by this Court that the provision of the judgment of the District Court entered December 30, 1997, in favor of the Department of Education is vacated and remanded to the District Court with instructions to dismiss the complaint against the Department of Education for want of jurisdiction. The provision of the aforementioned judgment with respect to the claims against the remaining defendants arising from the events occurring during Z.H.'s first grade year is affirmed. The provision of the aforementioned judgment with respect to the remaining claims is vacated and remanded to the District Court with instructions to provide C.H. an opportunity to amend the allegations of her complaint concerning them. Costs taxed against appellant. All of the above is in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

DATED: August 28, 2000

Filed October 22, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-5061

C.H., AS GUARDIAN AD LITEM OF Z.H., A MINOR
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v.

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(Opinion filed October 22, 1999)

---

* Honorable Joseph J. Longobardi, Senior United States District Judge for the District of Delaware, sitting by designation.

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

C.H., as guardian ad litem of Z.H. and on her own behalf, appeals from an order of the District Court dismissing her complaint in this civil rights action. She alleges that the defendants, New Jersey public school authorities, impermissibly restricted Z.H.'s freedom of expression while he was a student in kindergarten and first grade. She also contends that the defendants' actions were so hostile toward religion as to violate the Establishment Clause. We will affirm.

I. *BACKGROUND*

Because we are reviewing the District Court's Rule 12(c) judgment on the pleadings, we view the facts and inferences to be drawn from the pleadings in a light most favorable to C.H., the non-moving party. *Janney Montgomery Scott, Inc. v. Shepard Niles Inc.*, 11 F.3d 399, 406 (3d Cir. 1993). The following facts are affirmatively alleged in the complaint.

This case arises from two incidents that occurred while Z.H. was a student at the Haines Elementary School in Medford, New Jersey. The first incident occurred while Z.H. was a kindergarten student. In the spirit of the Thanksgiving holiday, Z.H.'s teacher asked the students to make posters depicting what they were "thankful for." Z.H. produced a poster indicating that he was thankful for Jesus. Initially, Z.H.'s poster was hung in the hallway outside the kindergarten classroom along with all of the other students' artistic works. Subsequently, on a day when Z.H.'s teacher was absent from school, certain unnamed employees of the Defendant Township of

Medford Board of Education removed Z.H.'s poster because of its religious theme. When Z.H.'s teacher returned the next day, she placed the poster back on the hallway wall, but hung it in a less prominent location at the end of the hallway.

The second incident occurred approximately one and one-half years later while Z.H. was a student in defendant Grace Oliva's first grade class at Haines Elementary School. As a reward for special achievement in reading assignments, Ms. Oliva invited students to bring to class a book from home and read one of their favorite stories to the class. The only pre-announced condition to this privilege was that Ms. Oliva would review the stories proposed by the students to insure that their length and complexity were appropriate for first graders. Z.H. qualified for this honor and brought to school his favorite book, entitled "The Beginner's Bible: Timeless Children's Stories," which was a cartoon-illustrated collection of 95 children's stories based upon The Bible. Z.H. asked to read "A Big Family," a story based upon *Genesis* 29:1-33:20 that read, in its entirety, as follows:

> Jacob traveled far away to his uncle's house. He worked for his uncle taking care of sheep. While he was there, Jacob got married. He had twelve sons. Jacob's big family lived on his uncle's land for many years. But Jacob wanted to go back home. One day, Jacob packed up all his animals and his family and everything he had. They traveled all the way back home to where Esau lived. Now Jacob was afraid that Esau might still be angry at him. So he sent presents to Esau. He sent servants who said, "Please don't be angry anymore." But Esau wasn't angry. He ran to

Jacob. He hugged and kissed him. He was happy to see his brother again.

After reviewing Z.H.'s selection, Ms. Oliva informed Z.H. that he could not read this story to the class "because of its religious content." Instead, Ms. Oliva permitted Z.H. to read the story to her outside the presence of the other students. Other students who brought in stories from non-religious sources were permitted to read their stories to the class.

Upon learning of her son's experience, C.H. contacted several school officials. First, C.H. contacted Ms. Oliva who informed her that Z.H. could not read "the Bible" in class "because it might influence other students." Next, C.H. contacted defendant Gail Pratt, Principal of Haines Elementary School, who explained that Z.H.'s reading selection "was the equivalent of praying and might upset Muslim, Hindu and Jewish students." Further, Pratt noted that there was "no place in the public school for the reading of the Bible" and that perhaps C.H. should consider removing Z.H. from public school. C.H. then contacted defendants Patrick Johnson, Superintendent of Schools, and the Medford Board of Education, demanding that Z.H. be allowed to read his story to the class and that the defendants apologize for their conduct. These defendants did not respond to this demand.

For apparently unrelated reasons, Z.H.'s family subsequently moved from the Medford school district. At the time the complaint was filed, Z.H. was attending public school in another community also in Burlington County, New Jersey.

C.H. filed a two-count complaint in the District Court, alleging that the defendants' actions violated Z.H.'s First Amendment right to freedom of expression. While her complaint did not allege that the defendants' actions violated the Establishment Clause, that claim was thereafter raised and the District Court's opinion addressed it. C.H. appeals the disposition of that claim, and we will consider it as well. Named as defendants were Oliva, Pratt, Johnson, the Medford School Board, Leo Klagholtz, New Jersey's Commissioner of Education, and the New Jersey Department of Education. In Count I, plaintiff sought monetary damages against the Medford defendants alleging that they intentionally, willfully or with reckless disregard, deprived Z.H. of his constitutionally protected right to freedom of expression in violation of 42 U.S.C. § 1983. In Count II, plaintiff alleged that the state defendants aided in the violation of Z.H.'s First Amendment rights, and sought an order requiring them to implement the policies necessary to protect from discrimination any student who presents religious views.

The defendants moved for judgment on the pleadings under Fed. R. Civ. P. 12(c). The District Court granted defendants' motion and dismissed the complaint against all defendants.[1] C.H. now appeals. We have jurisdiction under 28 U.S.C. § 1291, and exercise plenary review over district court dismissals under Rule 12(c). *Hayes v.*

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[1]The District Court's opinion also addressed a number of the defendants' jurisdictional defenses. *See C.H. v. Oliva*, 990 F. Supp. 341, 347-52 (D.N.J. 1996). In so doing, the District Court dismissed the State Department of Education as a defendant on Eleventh Amendment grounds and removed C.H. as a plaintiff in her personal capacity because she lacked standing. *Id.* at 348-49.

Community Gen. Osteopathic Hosp., 940 F.2d 54, 56 (3d Cir. 1991); *Jablonski v. Pan Am. World Airways, Inc.*, 863 F.2d 289, 290 (3d Cir. 1988).

II. *"A BIG FAMILY"*

A.

While the parties dispute some details, they agree that (1) "A Big Family" was an appropriate response to the assignment given by Ms. Oliva to her first-grade class in the sense that it was a favorite story of Z.H.'s and was of appropriate length and reading complexity, and (2) Z.H. was permitted to read "A Big Family" only to his teacher and not to his classmates in class because it was a story based upon the Bible. Accordingly, the issue presented by the undisputed facts can be simply stated: whether public school students in the first grade have a First Amendment right to present religious material in class where that material is responsive to a teacher's assignment.

Plaintiff correctly points out that state policies that restrict expression of religious perspectives are not viewpoint neutral even where those policies apply equally to all religious perspectives. While such policies do not discriminate against any particular religious faith, they do discriminate against non-secular perspectives. *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384, 393-94 (1993). As a result, plaintiff insists such restrictions are precluded by the First Amendment where, as here, they are not narrowly tailored to serve a compelling state interest.

The defendants respond that, in the context of a first-grade classroom, a teacher must be able to take cognizance of the fact that state-compelled exposure of

young children to religious material is a matter of great sensitivity among members of a school community. Defendants insist that students of this age are very impressionable and cannot be relied upon to distinguish between those things their teacher endorses and those things she merely allows to be expressed in her classroom. Accordingly, the defendants urge that the situation confronted by Ms. Oliva held a realistic and substantial risk of the school's being perceived by the students and their parents as endorsing the Bible before a captive and vulnerable audience. They conclude that teachers must be permitted to avoid subject matter holding this kind of potential for disruptive controversy.

B.

Although it is undisputed that public school students " 'do not shed their constitutional rights . . . at the schoolhouse gate,' the nature of those rights is [determined by] what is appropriate for children in school." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995) (quoting *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969)). "The State's power over school children . . . is custodial and tutelary, permitting a degree of supervision and control that cannot be exercised over free adults." *Id.* at 655. Moreover, it is well accepted that public schools perform a critical role in shaping the nation's youth, and that federal courts should be wary of interfering in this process. As the Supreme Court observed more than thirty years ago:

> Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.

Epperson v. Arkansas, 393 U.S. 97, 104 (1968). Over the years, the Court has repeatedly reemphasized this theme. *E.g., Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988).

With this foundation, we turn to the Supreme Court precedent most helpful in the current context, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). In *Hazelwood*, the Supreme Court considered whether a public school's decision to excise two articles from the student paper violated the students' First Amendment rights. The newspaper, Spectrum, was written and edited by the high school's Journalism II class, under the direction of the teacher, and was published and printed with funds supplied by the high school. Prior to the final press run of the school year, the teacher reviewed the year's final edition and objected to two stories that were scheduled to be included. One of the stories described the experiences of three of the school's students with pregnancy, the other discussed the impact of divorce on students at the school, and both were written in a manner that might have revealed the identity of at least some of the students and parents discussed. Because he believed there was insufficient time before the scheduled press run to modify the stories, the teacher elected to pull the stories from the press run with the approval of his superiors.

The Supreme Court first addressed the issue of whether Spectrum could appropriately be characterized as a public forum. The Court found that the school had never evinced an "intent to open the pages of Spectrum to 'indiscriminate use' by its student[s]," and, on the contrary, had "reserve[d] the forum for its intended purpos[e] as a supervised learning experience for journalism students."

Hazelwood, 484 U.S. at 270 (internal citations and quotation marks omitted). For these reasons, Spectrum was found to be a non-public forum. This meant that the school was entitled to exercise control over the content of the paper for purposes other than maintaining discipline and avoiding disruption of the learning process.

The *Hazelwood* Court then explained that there was an important additional distinction between speech that may be perceived as promoted by a school and speech that a school is asked only to tolerate:

> The question whether the First Amendment requires a school to tolerate particular student speech ... is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Hazelwood, 484 U.S. at 270-71.

Hazelwood teaches that student expression that is a part of a school curriculum may be subject to greater restrictions than tolerated speech and articulates the relevant legal standard to be applied in cases involving such expression:

> Educators are entitled to exercise greater control over this . . . form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. . . . [E]ducators do not offend the First Amendment by exercising . . . control over the style and content of student speech in school-sponsored expressive activities *so long as their actions are reasonably related to legitimate pedagogical concerns*.

Id. at 271-73 (emphasis added).

The Court gave the following examples of the kinds of restrictions that would be considered "reasonably related to legitimate pedagogical concerns":

> [A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise

> inconsistent with "the shared values of a civilized social order," or to associate the school with any position other than neutrality on matters of political controversy.

Id. at 272 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

It is apparent from these examples that a viewpoint-based restriction on student speech in the classroom may be reasonably related to legitimate pedagogical concerns and thus permissible. A rule foreclosing classroom speech that promotes the use of alcohol or that advocates a position on a controversial political issue is recognized by *Hazelwood* to be permissible even though it is not viewpoint neutral.

After thus explicating the "legitimate pedagogical concerns" standard, the *Hazelwood* Court turned to the case before it and conducted a contextual analysis that took into account the sensitive nature of the subject matter of the excised articles and the ages of the intended audience, as well as the privacy interests of the students and parents that might have been identified. The ultimate conclusion was that the First Amendment rights of the student journalists had not been violated. In the course of reaching this conclusion, the Court rejected the argument that school officials should be permitted to exercise prepublication control over school-sponsored student expression only pursuant to preestablished criteria. It believed that preestablished "regulations in the context of a curricular activity could unduly constrain the ability of educators to educate." *Hazelwood*, 484 U.S. at 273 n.6.

Hazelwood clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns. Contrary to plaintiff's suggestion, this remains the law of the land.

Plaintiff insists that under *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 385 (1993), and *Rosenberger v. Rector*, 515 U.S. 819 (1995), absent a compelling state interest, it is no longer permissible under any circumstances for a school to prohibit religious perspectives while permitting secular ones. *Lamb's Chapel* and *Rosenberger* are distinguishable from *Hazelwood*, however. The student speech at issue in both *Rosenberger* and *Lamb's Chapel* is more appropriately characterized as "tolerated," rather than "promoted," speech. Indeed, *Rosenberger* expressly distinguished and preserved *Hazelwood* on this ground.

In *Lamb's Chapel*, a public school restricted speech by permitting numerous community organizations to access its facility for after-hours use, while denying a church organization access when it sought to use the facilities to show a film series on family and child-rearing issues from a Christian perspective. In *Rosenberger*, the University restricted student speech by refusing to grant funding from a student activities fund for extracurricular activities to a student-run publication with an explicitly Christian perspective, even though such funding was granted to other student organizations. In neither case did the expressive activity at issue "occur in a traditional classroom setting, . . . supervised by faculty members and designed to impart particular knowledge or skills to

students," as in *Hazelwood*. *Hazelwood*, 484 U.S. at 570. Moreover, *Rosenberger* distinguished *Hazelwood* on the ground that the latter dealt with the State's ability to impose restrictions on the school's own speech, whereas *Rosenberger* addressed state restrictions on private, or tolerated, speech:

> [W]hen the [State] determines the content of the education it provides, it is the [State] speaking, and we have permitted the government to regulate the content of what is or is not expressed when it is the speaker.... It does not follow, however, ... that viewpoint-based restrictions are proper when the [State] does not itself speak or subsidize transmittal of a message it favors.... A holding that the [State] may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the [State's] own speech, which is controlled by different principles. *See, e.g., Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270-72 (1988).

Rosenberger, 515 U.S. at 833-34.

Thus, the requirement of viewpoint neutrality, while essential to the analysis of a school's restrictions on extracurricular speech, such as that at issue in *Rosenberger* and *Lamb's Chapel*, is simply not applicable to restrictions on the State's own speech. Under *Hazelwood*, "[e]ducators are entitled to exercise greater control over . . . student expression" when it is elicited as part of a teacher-supervised, school-sponsored activity. *Hazelwood*, 484 U.S. at 271. In that specific environment, viewpoint neutrality is neither necessary nor appropriate,

as the school is there responsible for "determin[ing] the content of the education it provides." *Rosenberger*, 515 U.S. at 833.[2]

C.

We have no difficulty concluding that Ms. Oliva's first-grade classroom was a non-public forum. There is no claim that the school invited the public, or any segment of the public, to use this forum for expressive activity. To the contrary, it was operated by the school exclusively for purposes of elementary education. While expressive activity was encouraged in this classroom, such expression was encouraged in the context of a "supervised

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[2]This conclusion is not inconsistent with *Chandler v. James*, No. 97-6898, 1999 WL 493495 (11th Cir. July 13, 1999). In *Chandler*, the Court held that the students' First Amendment right to freedom of expression was violated where students were barred from engaging in purely student-initiated, unsupervised, religious expression at school, such as prayer or other devotional speech at school-related assemblies, sporting events, or graduation ceremonies. The *Chandler* Court focused on the fact that the student speech at issue was purely student-initiated, and found that "the speech is not the State's — either by attribution or by adoption." *Id.* at *6. Unlike Z.H.'s speech here, the student speech at issue in *Chandler* was clearly "tolerated" speech, triggering a higher level of scrutiny of the restrictions involved. Indeed, the Court's conclusion that the limitation was unconstitutional was expressly predicated on this fact, thereby distinguishing it from the case at bar. *See id.* at *10 ("So long as school personnel do not participate in or actively supervise student-initiated speech, [the County School Board] cannot constitutionally prohibit students from speaking religiously. . . .").

learning experience." *Id.* at 270. In this respect, the forum at issue here is analogous to that in *Hazelwood*, in which a school- sponsored, student-run newspaper was held to be a nonpublic forum largely because the school retained control over the paper to ensure it was reserved "for its intended [educational] purpose." *Id.*; *see also Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1540 (7th Cir. 1996) (elementary school classroom was a nonpublic forum); *Duran v. Nitsche*, 780 F. Supp. 1048 (E.D.Pa.1991) (same).

We also have no difficulty concluding that Z.H.'s proposed story, like Spectrum, was a part of the school's curriculum and is appropriately characterized as promoted expression. It necessarily follows that the issue for decision is whether the decision to deny permission to read "A Big Family" to the class was reasonably related to a legitimate pedagogical concern. We conclude that it was.

D.

We note at the outset that the decision maker here was the classroom teacher, Ms. Oliva. She was vested with the authority, unconstrained by school regulations, to determine the manner in which the classes should be conducted so as to best serve the educational mission of the school. This required her to exercise her discretion in light of all the circumstances she confronted. Her exercise of this discretion is entitled to substantial deference from this Court not only because she is a professional educator, but also because she is in a far better position than we to predict how students and their parents are likely to respond to the way she conducts her class in any given situation and what impact those responses may have on the ongoing educational process.

Z.H. wanted to read a story from "The Beginner's Bible." If he were permitted to do so, it was reasonable to expect that other students might recognize that presentation as a story from the Bible. Even if Z.H. did not choose to expressly so inform his classmates, the title of the volume, the names of the characters and the clothing in which the characters were depicted in the illustrations could convey this message. To be sure, as plaintiff stresses, the content of the story was consistent with its being from a secular source. But the potential for Z.H.'s presentation being perceived by some of his classmates as a reading from the Bible clearly existed, and we believe a teacher in Ms. Oliva's position was entitled to take that fact into account.

In determining whether Ms. Oliva's decision was reasonably related to legitimate pedagogical concerns, the context is, of course, crucial. Ms. Oliva's was a first-grade class. For children at this level, their teacher is a primary source of authority in their lives. They look to their teacher for signals of appropriate behavior. As a result, lessons that a first-grade teacher imparts to a class, or allows to be imparted in a classroom under her supervision, are likely to be understood as carrying her imprimatur. While older students may be able to distinguish messages a teacher specifically advocates from those she merely allows to be expressed in the classroom, most first graders cannot be counted on to make this nuanced distinction.

We believe it was also an important part of the context of Ms. Oliva's decision that the classroom setting involved a religiously heterogeneous and captive audience. It is not unreasonable to expect that parents of non-Christian children would resent exposure of their six-year-old

children to a reading from the Bible. Nor is it unreasonable to expect that some parents of Christian first graders would regard a compelled classroom exposure to material from the Bible as an infringement of their parental right to guide the religious development of their children at this stage. Moreover, it is not unreasonable to expect that any resentment engendered by Z.H.'s reading would have a significant adverse impact on the important relationship between the parents, the teacher, and their school.

It is most certainly true, as plaintiff emphasizes, that religion is an important part of the human experience and that no child's education can reasonably be regarded as complete without meaningful exposure to the variety of religious perspectives that he or she will encounter in the community and to the impact that religion has had in the development of civilization. For this reason, there are undoubtedly some contexts in which a school's foreclosure of student religious expression in a classroom will not be reasonably related to a legitimate pedagogical concern. The pedagogical issue presented by this case, however, is one of timing. Our holding is a narrow one: a first-grade public school teacher may reasonably conclude that the pedagogical detriment likely to flow from permitting what may be perceived as a reading of a Bible story in her classroom outweighs any pedagogical benefits.

III. *THE POSTER*

We now turn to the school's decision to temporarily remove Z.H.'s poster from the kindergarten arts display. Our analysis and conclusion parallel those of the preceding section. First, we conclude that the display area in the hall outside the kindergarten classroom, like the

first-grade classroom, was a non-public forum. Nothing in the record suggests that it had been opened up to the display of any material not constituting, or generated in response to, the school's educational curriculum. Moreover, we also conclude that the art display, like the stories read in class, was "promoted" rather than "tolerated" speech. It follows that the issue to be resolved is whether the school's decision to temporarily remove Z.H.'s poster was reasonably related to a legitimate pedagogical concern.

Z.H.'s kindergarten teacher accepted his poster as responsive to the assignment--that he depict something for which he was thankful. She placed it in the hall with the posters of his classmates. During the teacher's absence from school, Z.H.'s poster was taken down because of concern over its religious content. It was restored to the display, however, by his teacher on her return. Given the sensitivity of the issues raised by student religious expression, coupled with the notable immaturity of the students involved and the relatively public display of the posters in the school hallway, the school's temporary removal of the poster does not violate the First Amendment rights of the student artist. As we have indicated, decisions on issues of this kind necessarily involve fact-sensitive exercises of discretion by school authorities and reservation of a brief period for deliberation is thus a measure reasonably related to legitimate pedagogical concerns. *Cf. Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1541 (7th Cir. 1996) (failure of school regulations to provide a definite time limit within which decisions to grant or deny permission to engage in expressive activity was reasonable); *Salinas v. Sch. Dist. of Kansas City*, 751 F.2d 288 (8th Cir. 1984) (delay occasioned by school board's deliberations over

sensitive requests for use of facilities for expressive activity did not violate the requester's First Amendment rights).[3]

IV.

Plaintiff additionally asserts that defendants violated the Establishment Clause. The District Court analyzed this claim under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and found no violation. On appeal to this Court, plaintiff insists that by welcoming favorite stories, but excluding those that the teacher deemed "religious," defendants exhibited a "hostility toward religion" that is barred by the Establishment Clause. In addition, plaintiff argues that by involving the teacher in the determination as to which stories are too religious to be read to the class, the defendants' conduct "entangles government with religion,

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[3]In her complaint, plaintiff alleges that the poster was removed "because of its religious theme." App. at 7. She further alleges that Z.H.'s teacher "properly returned the poster to the hallway, although this time the poster was placed at a less prominent location at the end of said hallway." *Id.* Plaintiff's complaint does not, however, accuse Z.H.'s teacher of having placed the poster in a less prominent location because of its religious content. Nevertheless, plaintiff argues before us that the placement of the poster on its return constituted an independent violation of Z.H.'s First Amendment rights. We decline plaintiff's invitation to require the District Court to review and regulate the school's placement of its students' artwork. Even if the sensitivity of the subject matter on Z.H.'s poster played some role in its placement, we believe that placement would be within the permissible discretion of Z.H.'s teacher for essentially the same reasons we have given in sustaining Ms. Oliva's exercise of her discretion.

and departs from the neutrality toward religion that the Establishment Clause mandates."

The plaintiff misconstrues the requirements of the Establishment Clause. To determine whether the defendants' conduct violated the Establishment Clause, we continue to apply the three-part test set out in *Lemon*. *See ACLU of New Jersey v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471, 1483 (3d Cir. 1996) (en banc). Briefly stated, a government practice does not offend the Establishment Clause if (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not create an excessive entanglement of government with religion. *Lemon*, 403 U.S. at 612-13. We agree with the District Court that this test is satisfied here.

First, the defendants' purpose in restricting Z.H.'s reading to Ms. Oliva alone was, as discussed at length above, distinctly secular. Ms. Oliva chose to restrict Z.H.'s reading as a means to ensuring that no student mistakenly believe that Z.H.'s religious beliefs were officially sanctioned by the school. This concern for the possibility of confusion, as well as the possibility that Z.H.'s story might "upset" other students, was motivated by distinctly educational considerations. There is no suggestion to the contrary. Second, the one-time restriction Ms. Oliva imposed cannot be said to have had "the effect of communicating a message of government endorsement or disapproval of religion," *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984), let alone the "hostility toward religion" which plaintiff alleges. Ms. Oliva's restriction was an appropriate compromise, well-justified by her pedagogical concerns. Rather than require Z.H. to pick "another" favorite story, her compromise

respected the integrity of his choice and permitted him to read his chosen tale in reward for his achievements. The accommodating approach Ms. Oliva took was thus far from hostile or disapproving. Finally, Ms. Oliva's conduct in this regard did little to entangle the government with religion. To the contrary, by implementing an alternative course that would not entail her incorporation of his reading into that day's classwork, or her "approval" of Z.H.'s performance before the class, Ms. Oliva deftly avoided any appearance of entanglement that might have resulted. *Compare Chandler*, 1999 WL 493495, at *8 ("Teacher participation in student-initiated prayer improperly entangles the State in religion and signals an unconstitutional endorsement of religion." (internal citation omitted)).

As the Supreme Court has explained, "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion, favoring neither one religion over others nor religious adherents collectively over nonadherents." *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696 (1994) (internal citations omitted). We think defendants appropriately steered such a neutral course in this case. Thus we agree with the District Court that, even viewing the facts in the light most favorable to the plaintiff, C.H. has failed to state a violation of the Establishment Clause.

V.

In sum, we conclude that plaintiff has failed to allege a violation of Z.H.'s First Amendment right to freedom of expression because the defendants' restrictions on Z.H.'s speech were reasonably related to a legitimate pedagogical concern. In addition, we find no violation of

the Establishment Clause. Finally, because we have found no constitutional violation, plaintiff is not entitled to injunctive relief.

Accordingly, we will affirm the order of the District Court granting defendants' judgment on the pleadings under Rule 12(c).

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-5061

C.H., As Guardian Ad Litem of Z.H., A Minor And C.H.
Individually, Appellant

v.

GRACE OLIVA;
GAIL PRATT;
PATRICK JOHNSON;
MEDFORD TOWNSHIP BOARD OF EDUCATION;
LEO KLAGHOLTZ, Commissioner of Education;
THE STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 96-cv-02768)
District Judge: Honorable Joseph H. Rodriguez

ARGUED BY COUNSEL
June 2, 1999

Present: Roth and Stapleton, Circuit Judges, and
Longobardi,* District Judge

*The Honorable Joseph J. Longbardi, Senior United States District Judge for the District of Delaware, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel June 2, 1999.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered December 30, 1997, be, and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ P. Douglas Sisk
Clerk

Dated: October 22, 1999

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-5061

C.H., AS GUARDIAN AD LITEM OF Z.H., A MINOR
AND C.H., INDIVIDUALLY
Appellant

v.

GRACE OLIVA; GAIL PRATT; PATRICK JOHNSON;
MEDFORD TOWNSHIP BOARD OF EDUCATION;
LEO KLAGHOLTZ, Commissioner of Education;
THE STATE OF NEW JERSEY DEPARTMENT OF
EDUCATION

Appeal from the United States District Court
For the District of New Jersey
(D.C. Civil No. 96-cv-02768)
District Judge: Honorable Joseph H. Rodriguez

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 14, 1998

BEFORE: STAPLETON and ROTH, Circuit Judges, and
LONGOBARDI,* District Judge

(Opinion filed SEP 25 1998)

*Honorable Joseph J. Longbardi, Senior United States District Judge for the District of Delaware, sitting by designation.

MEMORANDUM OPINION OF THE COURT

STAPLETON, Circuit Judge:

Z.H., through his mother and guardian ad litem C.H., appeals the district court's dismissal of his § 1983 action alleging that the defendants violated the First Amendment.[1] The defendants, state public school authorities, limited Z.H.'s freedom of expression when he attempted to introduce religious subjects in his kindergarten and first grade classrooms. C.H. claims that the defendant's actions (i) violated Z.H.'s First Amendment right to free speech, and (ii) were so hostile toward religion as to violate the Establishment Clause. The defendants respond that they did not violate Z.H.'s freedom of expression because their actions were viewpoint neutral and reasonably related to a legitimate pedagogical interest. Additionally, they argue that they did not violate the Establishment Clause. The district court agreed with defendants and granted defendants judgment on the pleadings under Federal Rule of Civil Procedure 12(c).

We agree with the district court and will affirm. First, the defendants' alleged actions regulating Z.H.'s free speech foreclosed all material having a religious source or

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[1] *C.H. v. Oliva et al.*, 990 F.Supp. 341 (D.N.J. 1997). Originally, C.H. was a plaintiff in her personal and guardian capacity. The district court dismissed C.H. as an appellant in her personal capacity because she lacked standing.

content, not just material having a Christian source or content. The regulations were viewpoint neutral and reasonably related to a legitimate pedagogical concern, and therefore do not offend the First Amendment. We must give substantial deference to public school authority discretionary decisions regarding what subjects are appropriate for elementary school classroom discussion. Second, C.H. does not directly challenge the district court's Establishment Clause decision, but rather argues that the defendants' actions were not viewpoint neutral. As noted, the defendants' actions were viewpoint neutral. Third, Z.H.'s poster does not fit within the *Marsh* exception to the Establishment Clause. Finally, because there was no constitutional injury C.H. is not entitled to injunctive relief.

Accordingly, we will affirm the district court's order granting defendant's judgment on the pleadings under Rule 12(c).

TO THE CLERK:

Please file the foregoing Memorandum Opinion.

/s/ Walter K. Stapleton
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-5061

C.H., AS GUARDIAN AD LITEM OF Z.H., A MINOR
AND C.H., INDIVIDUALLY
Appellant

v.

GRACE OLIVA; GAIL PRATT; PATRICK JOHNSON;
MEDFORD TOWNSHIP BOARD OF EDUCATION;
LEO KLAGHOLTZ, Commissioner of Education;
THE STATE OF NEW JERSEY DEPARTMENT OF
EDUCATION

Appeal from the United States District Court
For the District of New Jersey
(D.C. Civil No. 96-cv-02768)
District Judge: Honorable Joseph H. Rodriguez

Submitted Pursuant to Third Circuit LAR 34.1(a)
September 14, 1998

BEFORE: STAPLETON and ROTH, Circuit Judges, and
LONGOBARDI,* District Judge

*Honorable Joseph J. Longobardi, Senior United States District Judge for the District of Delaware, sitting by designation.

On consideration whereof, it is

ORDERED AND ADJUDGED by this Court that the judgment of the district court entered December 30, 1997, be and the same is hereby affirmed

Costs taxed against appellant.

ATTEST:
/s/ P. Douglas Sisk
Clerk

Dated: Sep 25 1998

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

C.H. as guardian ad litem of Z.H., a minor, and C.H. individually, Plaintiffs,	:	Civil Action No. 96-2768.
v.	:	OPINION
GRACE OLIVA, GAIL PRATT, PATRICK JOHNSON, MEDFORD TOWNSHIP BOARD OF EDUCATION, LEO F. KLAGHOLTZ, COMMISSIONER OF EDUCATION, THE STATE OF NEW JERSEY DEPARTMENT OF EDUCATION, Defendants.	:	ORIGINAL FILED DEC 30 1997

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RODRIGUEZ, District Judge.

This matter is before the court on motions of (1) defendants Medford Township Board of Education, Grace Oliva, Gail Pratt, and Patrick Johnson (the "Medford defendants"), and (2) defendants State of New Jersey Department of Education and Leo Klagholz, Commissioner of the State of New Jersey Department of Education (the "State defendants"), for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). The court, having considered the

submissions of the parties, and for the reasons set forth below, grants the motions and dismisses the complaint.[1]

BACKGROUND

The basic facts are not in dispute. Prior to February 23, 1996, Z.H. was a student at Haines Elementary School, which is one of defendant Medford Township Board of Education's public schools. While Z.H. was in kindergarten in 1994, students in his class were asked to make posters depicting things for which they were thankful. Z.H.'s poster professed his thanks for "Jesus." All the posters were then placed on display in the school hallway. Apparently, while the regular classroom teacher was absent, some unknown person removed Z.H.'s poster due to its religious theme. Upon the classroom teacher's return, the poster was returned to display, albeit in a less prominent location than it had previously occupied.

A similar incident occurred in February 1996 while Z.H. attended defendant Grace Oliva's first grade class at Haines Elementary. Ms. Oliva maintained a policy in her class which rewarded students reaching a certain level of reading proficiency by allowing them to read a book of their own choosing to the rest of the class.[2] On February 9,

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[1]It appears from the submissions of the parties that plaintiffs have served the defendants with a proposed amended complaint. However, plaintiffs have neither filed this amended complaint nor moved for leave to file it. Accordingly, the initial complaint will be entertained in the disposition of these motions.

[2]The material was subject to review by Ms. Oliva to ensure that it would be suitable in length and complexity

1996, Z.H. chose to read a story called "A Big Family," an adaptation of chapters 29-33 of the Book of Genesis, from a book entitled "The Beginner's Bible."[3] *See Genesis* 29:1-33:20. However, because of its religious content, Ms. Oliva did not allow Z.H. to read the story to the class. Instead, although the other students were allowed to read their non-religious stories to the class, he was only allowed to read the story to Ms. Oliva.

After C.H., Z.H.'s mother, was notified that the story was inappropriate, she made both informal and formal demands of the various Medford defendants that Z.H. be allowed to read the story to the entire class.[4] These

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for first grade students. Compl. at ¶ 17.

[3]The story "A Big Family" reads:

> Jacob traveled far away to his uncle's house. He worked for his uncle, taking care of sheep. While he was there, Jacob got married. He had twelve sons. Jacob's big family lived on his uncle's land for many years. But Jacob wanted to go back home. One day, Jacob packed up all his animals and his family and everything he had. They traveled all the way back to where Esau lived. Now Jacob was afraid that Esau might still be angry at him. So he sent presents to Esau. He sent servants who said, "Please don't be angry anymore." But Esau wasn't angry. He ran to Jacob. He hugged and kissed him. He was happy to see his brother again.

[4]These demands included issuance of formal apologies to both Z.H. and C.H.

demands were not satisfied. Accordingly, on June 5, 1996, plaintiffs instituted the present action, alleging, in a two count complaint, that (1) the actions of the Medford defendants willfully and intentionally violated Z.H.'s rights to Freedom of Expression under the First Amendment and 42 U.S.C. § 1983, and (2) the State defendants, by failing to either exercise their supervisory powers or implement a policy to allow for expression of religious beliefs in the classroom, aided in this violation. The complaint seeks both monetary and injunctive relief. The State and Medford defendants answered the complaint, and on April 9, 1997 and April 10, 1997 respectively, moved for judgment on the pleadings,[5] raising several independent reasons why the complaint, in its entirety, should be dismissed. These motions are presently before the court.

DISCUSSION

A. *Standard for Judgment on the Pleadings*

Motions for judgment on the pleadings under Fed. R. Civ. P. 12(c) are treated similar to motions to dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6)--judgment will not be entered unless the moving party establishes that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. *Society Hill Civic Association v. Harris*, 632 F.2d 1045, 1054 (3d Cir. 1980) (citing WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1368 at 690 (1969)). In considering the motion, the court must "view the facts presented in the

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[5]The State defendants filed a motion to dismiss the amended complaint, or, in the alternative, for summary judgment.

pleadings and the inferences to be drawn therefrom in a light most favorable to the nonmoving party." *Id.*

B. *Threshold Issues*

Prior to reaching the merits of plaintiffs' claims, the State defendants offer several bases for dismissal of the complaint, the majority of which were not addressed by plaintiffs in opposition. Nonetheless, each will be considered in turn.

1. *Eleventh Amendment Immunity to Suit*

First, the State defendants argue that the Eleventh Amendment bars plaintiffs' claims against them. That Amendment reads:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. This Amendment has consistently been interpreted to prohibit federal courts from hearing suits brought by citizens against their own state. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98, 104 S. Ct. 900, 906-07, 79 L. Ed. 2d 67 (1984) (citing *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890)). Although a party seeking to recover money damages from the state treasury is precluded from obtaining federal jurisdiction over a state without its consent to suit,[6] *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct.

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[6]The immunity from suit also extends to "agencies

1347, 39 L. Ed. 2d 662 (1974), the amendment's bar does not apply when a plaintiff is seeking prospective injunctive relief from state officials violating federal law.[7] *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908); *Pennhurst*, 465 U.S. at 102-03, 104 S. Ct. at 909.

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or departments" of the state. *Pennhurst*, 465 U.S. at 100, 104 S. Ct. at 908 ("It is clear, of course, that in the absence of consent, a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment."). Such "agencies or departments" of the State of New Jersey include its Department of Education. *See* N.J. STAT. ANN. § 18A:4-1.

[7]42 U.S.C. § 1983 does not act as a general waiver of immunity that allows states to be sued in federal court. Therefore, in an action for monetary damages brought under § 1983, a state's consent to suit is still required before jurisdiction can attach. *See Edelman*, 415 U.S. at 651, 94 S. Ct. at 1347, 39 L. Ed. 2d at 662. Nonetheless, under *Ex Parte Young*, state officials may be sued under § 1983 for prospective injunctive relief. *Ex parte Young*, 209 U.S. at 123, 28 S. Ct. at 441, 52 L.Ed. at 714.

In addition, counties and municipalities, although considered "persons acting under color of state law" under § 1983, are not considered part of the state for purposes of Eleventh Amendment immunity. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Therefore, actions for both injunctive relief and monetary damages may be brought against these entities.

Here, plaintiffs' only claim against the State defendants is contained in Count Two of the complaint which seeks prospective injunctive relief.[8] No claim for monetary damages is made against either the Department of Education or Commissioner Klagholz for the alleged failure to exercise supervisory powers and enact policies which would protect the constitutional rights of children such as Z.H. However, although N.J. STAT. ANN. § 52:4A-1 acts as a waiver of sovereign immunity for constitutional violations in state court,[9] it does not constitute consent to suit in the federal courts. *Kennecott Copper Corp. v. State Tax Commission*, 327 U.S. 573, 66 S. Ct. 745, 90 L. Ed. 862 (1946). Therefore, although the Eleventh Amendment does not bar plaintiffs' action against Commissioner Klagholz, it does bar the claims against the State Department of Education.

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[8]The sufficiency of that relief is immaterial to Eleventh Amendment analysis and will be considered below.

[9]N.J. STAT. ANN. § 52:4A-1 states:

> Actions on Tort against state.
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> Except for actions founded upon the Constitution of this state or the United States or an express provision of the statutory laws of this State, no action shall be instituted or continued against the State or any department or other agency thereof for the recovery of money damages, based on tort, where the cause of action accrues prior to July 1, 1972.

2. *Political Question Doctrine and Separation of Powers*

The State defendants claim that the plaintiffs' lawsuit comprises a nonjusticiable political question and implicates the separation of powers doctrine. They argue that only the United States Department of Education and the executive branch of government have the authority to grant the plaintiffs the relief they request. Therefore, any federal judicial intervention in matters that have been traditionally relegated to the executive branch and state and local authorities would be improper.

To the extent the defendants argue that the federal courts cannot compel the state to adopt general educational policies, they are correct. However, when the complaint is viewed in the light most favorable to the plaintiffs, their claim for relief can be construed as a demand for the State defendants to cease their wrongful behavior and adhere to constitutional principles.[10] This certainly goes beyond a simple request to adopt basic policies. In this light, the plaintiff's claim falls within this court's jurisdiction. The Third Circuit, commenting on the scope of the political question doctrine, has stated that "while it is not the role of the courts to disturb policy decisions of the political branches, the question of whether an agency has acted in accordance with a statute is appropriate for judicial review." *Specter v. Garrett*, 971 F.2d 936, 954 (3d Cir. 1992). This axiom naturally applies when the issue concerns whether an agency has complied with the

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[10]The propriety of the plaintiffs' claim for injunctive relief will be discussed below.

Constitution. Thus, the plaintiffs' claims are not barred from consideration.

3. *Standing*

The State defendants argue that plaintiffs lack standing to bring this action. Standing in an Article III court can only be obtained by a plaintiff who files a complaint that demonstrates compliance with both constitutional and prudential requirements. *See Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471, 102 S. Ct. 752, 758, 70 L. Ed. 2d 700 (1982). To meet the constitutional requirements, a party must " 'show that [they] personally ha[ve] suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' . . . and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision[.]' " *Id.* at 472, 102 S. Ct. at 758 (citations omitted). Prudential principles also require that the plaintiff assert his own legal rights, the grievance be specific to plaintiff and not generalized, and the complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 474-75, 102 S. Ct. at 760 (citing *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S. Ct. 827, 830, 25 L. Ed. 2d 184 (1970) (footnote omitted)).

C.H. has instituted this action in both her capacity as guardian ad litem of Z.H., and in an individual capacity. However, the right asserted against and relief requested from Commissioner Klagholz--adoption of policy to prevent future violations of students' constitutional rights--is not her own. As a result, C.H. does have standing to

proceed with the suit against Commissioner Klagholz in her capacity as Z.H.'s guardian ad litem, but not in an individual capacity.

4. *Abstention Doctrine*

The State defendants urge this court to abstain from hearing the claims brought against them. Under the doctrine announced in *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971), federal courts, based upon principles of comity, are required to abstain from hearing actions similar to those filed in state courts "in which important state interests are implicated, so long as the federal claimant has an opportunity to raise any constitutional claims [in the state proceeding.]" *O'Neill v. City of Philadelphia*, 32 F.3d 785, 789 (3d Cir. 1994), *cert. denied*, 514 U.S. 1015, 115 S. Ct. 1355, 131 L. Ed. 2d 213 (1995); *see also Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S. Ct. 1519, 95 L. Ed. 2d 1 (1987) (applying *Younger* in the civil context); *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982) (applying *Younger* to administrative proceedings).

A party arguing in favor of *Younger* abstention must show: (1) that there are ongoing state judicial-type proceedings involving the federal claimant; (2) which implicate important state interests; and (3) which provide an adequate opportunity to present the federal claims. *Middlesex County*, 457 U.S. at 432, 102 S. Ct. at 2521. However, parallel actions may nonetheless be maintained "so long as the plaintiff does not seek relief in the federal court that would interfere with the state judicial process." *Marks v. Stinson*, 19 F.3d 873, 885 (3d Cir. 1994), *cert. denied*, 513 U.S. 1111, 115 S. Ct. 901, 130 L. Ed. 2d 785

(1995). In these circumstances, "the principles of comity underlying *Younger* abstention are not implicated." *Gwynedd Properties, Inc. v. Lower Gwynedd Township*, 970 F.2d 1195, 1201 (3d Cir. 1992).

The State defendants argue that the complaint should be dismissed because plaintiffs have a state administrative avenue available to seek redress, and because it is clear that the complaint implicates important state interests (plaintiffs are seeking the statewide adoption of policies which would allow the reading of secular-based materials in the public schools). However, there are no ongoing judicial-type proceedings which would implicate the principles of comity necessary for abstention under *Younger*. Contrary to the State defendant's assertion, the mere ability of a plaintiff to seek redress in an alternative forum is not sufficient.[11]

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[11]In arguing that the existence of an available state proceeding may be interpreted as a "parallel action" for *Younger* purposes, the State defendants cite *O'Neill v. City of Philadelphia*, 32 F.3d 785, 790-91 (3d Cir. 1994). That interpretation, however, goes well beyond the principles articulated in that case. *O'Neill* concerned a situation where the plaintiffs failed to seek judicial review of unfavorable state administrative determinations so they could sooner file suit in federal court. *Id.* The Third Circuit held this to be an improper maneuver to slip into federal court, and thus found that the prior case was still "pending," compelling abstention. The instant case, in contrast, gives no indication that the plaintiffs have "chosen not to pursue their state-court judicial remedies, but have instead sought to invalidate the State's judgment by filing a federal action." *Id.* at 791. Consequently, because there are no pending state cases here, abstention under *Younger* is not

Under the doctrine announced in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L.Ed. 1424 (1943),

> [w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

New Orleans Public Service, Inc. v. Council of City of New Orleans, (NOPSI), 491 U.S. 350, 361, 109 S. Ct. 2506, 2514, 105 L. Ed. 2d 298 (1989). "The core of the *Burford* abstention doctrine . . . is that federal courts should avoid needless disruption of an important and complex state regulatory scheme." *Lac D'Amiante du Quebec v. American Home Assurance Co.*, 864 F.2d 1033, 1038 (3d Cir. 1988); *see also United Services Automobile Association v. Muir*, 792 F.2d 356, 364 (3d Cir. 1986) ("Generally, *Burford* abstention is justified where a complex regulatory scheme is administered by a specialized state tribunal having exclusive jurisdiction."), *cert. denied*, 479 U.S. 1031, 107 S. Ct. 875, 93 L. Ed. 2d 830 (1987). *Burford* abstention is inapplicable in cases where such a regulatory scheme is

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appropriate.

lacking. *See Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 534-35 (3d Cir. 1988); *Muir*, 792 F.2d at 365.

The State defendants claim that the system of public education in New Jersey is "a highly regulated and complex administrative system" that would necessitate abstention under *Burford*. State Defs.' Br. at 24. However, while the Department of Education is a state-run system, the defendants have failed to show how it qualifies as a complex regulatory scheme. Significantly, the scenarios to which *Burford* normally applies concern far more complicated administrative and regulatory systems. *See, e.g., General Glass Industries Corp. v. Monsour Medical Foundation*, 973 F.2d 197, 201 (3d Cir. 1992) ("Pennsylvania has expressed its strong state interest in regulating insurance companies [liquidation procedures] through a complex regulatory scheme, known as the Insurance Department Act"); *Lac D'Amiante du Quebec*, 864 F.2d at 1045 (holding that New York's regulation of insolvent insurance companies was a "detailed, complex scheme"); *but see Felmeister v. Office of Attorney Ethics*, 856 F.2d 529, 534 (3d Cir. 1988) (holding that Committee on Attorney Advertising that was reviewed by New Jersey Supreme Court did not present the "complex, technical, regulatory scheme to which the Burford abstention doctrine usually is applied.").[12]

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[12]In *Felmeister*, the court found that the New Jersey committee was significantly different from the regulatory scheme in *Burford*. The court noted that "the regulation of attorney advertising, unlike the regulation of oil and gas conservation involved in *Burford*, does not involve peculiarly local conditions, is not beyond the understanding of a federal court, and does not require special or technical expertise or interpretation of numerous other state

It is significant that the schemes that have traditionally compelled abstention under *Burford*, which were created and administered by complex statutes, are noticeably different from New Jersey's public school system. Moreover, "while *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict with state regulatory law or policy.' " *Motor Club of America v. Weatherford*, 841 F. Supp. 610 (D.N.J. 1994) (quoting *NOPSI*, 491 U.S. 350, 362, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989)). For the above reasons, abstention under *Burford* is inappropriate.

5. *Ripeness*

Finally, the State defendants argue that plaintiffs' claims are not ripe for judicial review. According to the State defendants, the claim for relief is not appropriate for review as it "is unquestionably based on a contingency, because the federal claims they seek to assert arise only if it is determined that students have the right to present religious views in school assignments, and adoption of a rule or policy by the State defendants guaranteeing this

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regulations." *Felmeister*, 856 F.2d at 534; *see United Services Automobile Association v. Muir*, 792 F.2d 356, 364-65 (3d Cir. 1986). While the New Jersey public school system may involve "peculiarly" local conditions, it is not beyond the understanding of the federal court and does not require special or technical expertise or interpretations.

right is necessary."[13] State Defs.' Br. at 25. They claim that this contingency renders the plaintiffs' potential remedy too remote and therefore beyond this court's jurisdiction.

"Ripeness prevents courts from 'entangling themselves in abstract disagreements.' " *Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio*, 40 F.3d 1454, 1462 (3d Cir. 1994), *cert. denied*, __ U.S. __ 117 S. Ct. 1334, 137 L. Ed. 2d 494 (1997) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99, 105, 97 S. Ct. 980, 984, 51 L. Ed. 2d 192 (1977), and *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 201, 103 S. Ct. 1713, 1720, 75 L. Ed. 2d 752 (1983)). "A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . . .' " *Presbytery of New Jersey*, 40 F.3d at 1463 (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975) (citation omitted)). Thus, the inquiry focuses on whether the plaintiffs have suffered some type of cognizable harm from the defendants' actions.

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[13]The State defendants also argue that the controversy is not ripe because plaintiffs have an available administrative remedy which they have not yet exhausted. However, as discussed above with respect to the *Younger* abstention, plaintiffs are not required to take this administrative avenue. Therefore, this basis for dismissal on ripeness grounds is rejected.

In this case, the plaintiffs have sufficiently alleged an injury capable of redress. They assert that the policies and actions of the defendants have detrimentally affected them, and not that there exists the potential for future harm. Unlike *Armstrong World Industries, Inc. v. Adams*, 961 F.2d 405 (3d Cir. 1992)[14] and *Presbytery of New Jersey*, where the plaintiffs sought a declaratory judgment and/or an injunction against a statute not yet enforced, the plaintiffs here have sought redress as a result of the enforcement of allegedly unconstitutional policies and procedures. Consequently, the plaintiffs' claim will not be dismissed as unripe.

C. *Merits of the Claims*

1. *Failure to State a Claim Under § 1983*

The State defendants first argue that the complaint should be dismissed because it does not state a claim under 42 U.S.C. § 1983. That section provides, in pertinent part, that

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[14]The State defendants also cite *Armstrong* to support their claim that the plaintiffs have not shown the requisite immediacy of the harm from which they are seeking relief. That case, however, is readily distinguishable from the instant one. In *Armstrong*, shareholders brought suit to challenge the constitutionality of an anti-takeover statute. *Id.* at 407-08. Their action was filed the same day that the law was passed, even before it had been applied to them. The plaintiffs in the present case, however, have sought redress *after* they have been subjected to the allegedly unconstitutional policies and conduct of the defendants.

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. Although the complaint clearly alleges deprivation of rights secured by the Constitution--Free Exercise of Religion--the State defendants claim that they were not acting under color of state law.

To determine if a challenged action was performed "under color of law," it must be determined "whether the state was sufficiently involved to treat that decisive conduct as state action."[15] *McKeesport Hospital v. Accreditation*

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[15]Two other tests utilized by the Supreme Court include whether "the private entity has exercised powers that are traditionally the exclusive prerogative of the state," *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1142 (3d Cir. 1995) (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004-05, 102 S. Ct. 2777, 2786, 73 L. Ed. 2d 534 (1982)); and whether "[t]he State has so far insulated itself into a position of interdependence with . . . [the acting party] that it must be recognized as a joint participant in the challenged activity." *Mark*, 51 F.3d at 1142 (quoting *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725, 81 S. Ct. 856, 862, 6 L. Ed. 2d 45 (1961), *cert. denied*, 516 U.S. 858, 116 S. Ct. 165, 133 L. Ed. 2d 107 (1985) (alterations in original)). These tests are not applicable here.

Council for Graduate Medical Education, 24 F.3d 519, 524 (3d Cir. 1994). Here, the Medford defendants were employed by an arm of the state and worked within a state-funded school system. Obviously, the State defendants were employees of the state and their conduct was directly attributable to their employer. For the purposes of this motion, the plaintiffs have sufficiently alleged deprivations caused by the State defendants that, if true, could entitle the plaintiffs to relief. Under the present circumstances, both the Medford and the State defendants clearly acted under the color of state law.

2. *First Amendment: Freedom of Expression*

The plaintiffs claim that the Medford defendants denied Z.H. his constitutional right to freedom of expression when they changed the location of Z.H.'s poster of Jesus and when they "arbitrarily and unreasonably prohibit[ed] him from reading his proposed story to his classmates." Pls.' Br. at 6. In analyzing this claim, like all free speech claims, the first inquiry must be whether or not the activity was conducted in a public forum. This issue is decided easily, as the plaintiffs do not offer any evidence or deny that Z.H.'s school or classroom were not public forums, and this conclusion is consistent with case law.[16]

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[16]The United States Supreme Court has held that

> school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other

Speech uttered in a non-public forum may be subject to time, place and manner regulations, and these regulations must be viewpoint-neutral and reasonably related to a legitimate governmental purpose.[17] In the

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> intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community.

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267, 108 S. Ct. 562, 568, 98 L. Ed. 2d 592 (1988) (citations omitted).

It is clear that Z.H.'s school and classroom were not public forums. This conclusion is also strongly supported by the fact that Z.H.'s teacher reserved the right to inspect and reject each child's reading selection before it was presented to the class.

[17]Regarding nonpublic forums, the Eight Circuit observed that, "[i]n addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Families Achieving Independence and Respect v. Nebraska Department of Social Services*, 111 F.3d 1408, 1419 (8th Cir. 1997).

While the heart of the defendants' power to regulate its students' speech lies in the fact that the school is not a public forum, it should also be noted that "the First Amendment rights of students in the public schools 'are not

context of the classroom, the inquiry is more specific: educators may "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273, 108 S. Ct. 562, 571, 98 L. Ed. 2d 592 (1988).[18] The plaintiffs concede that this is the applicable standard, however, they contend that there were no legitimate pedagogical concerns in

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automatically coextensive with the rights of adults in other settings,' and must be 'applied in light of the special characteristics of the school environment.' " *Hazelwood*, 484 U.S. at 266, 108 S. Ct. at 567 (citations omitted) (quoting *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 682, 106 S. Ct. 3159, 3164, 92 L. Ed. 2d 549 (1986), and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S. Ct. 733, 736, 21 L. Ed. 2d 731 (1969)).

[18]The *Hazelwood* court noted that "[t]he question whether the First Amendment requires a school to tolerate particular student speech ... is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." *Hazelwood*, 484 U.S. at 270-71, 108 S. Ct. at 569-70. "Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Id.* at 271, 108 S. Ct. at 570.

taking down Z.H.'s poster of Jesus and not allowing Z.H. to read the "Beginner's Bible" to his classmates.[19]

Z.H. had no constitutional right to have the poster of Jesus displayed in any particular location; therefore, relocating the poster to a less conspicuous position on the wall was not a restriction on his speech. Even assuming *arguendo* that his freedom of speech was impinged, "content-based restrictions on speech need only be 'reasonable in light of the purpose served by the forum and . . . viewpoint neutral.' " *Duran v. Nitsche*, 780 F. Supp. 1048, 1052 (E.D. Pa. 1991).

The plaintiffs argue that the Medford defendants were not "viewpoint neutral" because they regulated Z.H.'s poster and book on the basis of their religious origin. However, "viewpoint neutral" does not mean that any regulation that touches upon the viewpoint of the speech is prohibited, but rather that regulations must be based solely on pedagogical concerns rather than a particular point of view. *See Duran*, 780 F. Supp. at 1052 ("In the educational setting, the standard for determining the reasonableness of a content-based restriction on school sponsored expressive activity in a non-public forum is whether the restriction is 'reasonably related to legitimate pedagogical concerns.' " (quoting *Hazelwood*, 484 U.S. at 273)).

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[19]The plaintiffs point out that the story contained "no vulgar, ungrammatical, poorly written, or overly complex material unsuitable for a class of first graders." Pls.' Br. at 9. While this is arguably correct, these are not the sole pedagogical considerations in determining whether or not material is suitable for students.

Both incidents--relocating the poster of Jesus and disallowing Z.H. to read the "Beginner's Bible" to his class--were reasonably related to legitimate pedagogical concerns. In fact, as the Medford defendants note, if the school had replaced the poster in a more prominent position because it depicted Jesus Christ, or even to counterbalance inferences of religious discrimination, the school could have run afoul of the Establishment Clause. *See Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994) (finding public school's display of portrait of Jesus violated Lemon test and Establishment Clause), *cert. denied*, 514 U.S. 1095, 115 S. Ct. 1822, 131 L. Ed. 2d 744; *see also Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (holding school's removal of Bible and other religiously oriented books from library and the school's forbidding teacher from reading Bible silently during class hours did not violate Establishment Clause or free speech rights of teacher), *cert. denied*, 505 U.S. 1218, 112 S. Ct. 3025, 120 L. Ed. 2d 896.

Furthermore, had the Medford defendants allowed Z.H. to read the "Beginner's Bible" to the rest of his first grade classmates, the possibility exists that they could have construed the presentation to be an endorsement of the Bible by the teacher. The plaintiffs note that the story Z.H. chose was fairly innocuous, and claim that "[h]ad Plaintiff's book had a different cover and had the characters had names like Joe and Ed, it is beyond issue that the plaintiff would have been allowed to read his story to the class." Pls.' Br. at 13-14. This is precisely true. Z.H. was not allowed to read the book to his classmates during class time because it was The Bible, a religious book that constitutes the very foundation for a number of, but obviously not all,

religions.[20] It is irrelevant that the story had no overt religious theme; the speech was the book itself.[21] If Z.H.'s

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[20]Obviously, if Z.H. was prohibited from reading the book solely because it was a Christian book while other students were allowed to read non-Christian religious books, this restriction would not have been viewpoint neutral.

[21]In their brief, the plaintiffs respond to a statement allegedly uttered by Z.H.'s principal, where she told C.H. that the reading of the Bible story had the potential of offending Muslim, Hindu or Jewish students. The plaintiffs state that:

> the characters of the story came from the Old Testament and therefore could hardly be offensive to Jewish students, Esau is considered a progenitor of the Arab race and therefore the story could hardly be considered offensive to Muslim students and since the proposed story contained no scriptural verse, reference to a deity or other religious doctrine, it could hardly be said to be offensive to Hindu or that matter even atheistic students.

Pls.' Br. at 3-4. This argument misconstrues the basic legal issue of this case. The issue is not whether the story was offensive or actually did offend, but whether the defendants acted constitutionally when they allowed Z.H. to read his "Bible" only to his teacher rather than his entire class of public school students. Even if every single student, teacher and administrator in Z.H.'s public school were strong adherents to Christianity, the Medford defendants' actions would still be appropriate.

teacher were to praise him for completing his reading assignment skillfully, (i.e. by saying something like "very good"), it is not unlikely that a child in first grade could interpret that comment as an endorsement of the story and the book. *See* Medford Defs.' Br. at 21. Therefore, allowing Z.H. to read the "Beginner's Bible" only to his teacher was a proper accommodation of Z.H.'s right of free expression and the principle of separation of church and state.

3. *First Amendment: Establishment Clause*

In very strong terms, the plaintiffs claim that the Medford defendants' actions constituted "nothing short of religious cleansing." Pls.' Br. at 13. Moreover, they claim that the defendants have established a "religion of secularism" by their alleged hostility towards religion. The defendants, however, maintain that their actions were not motivated by any prejudice and that their actions were proper under *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971).[22]

To be sure, "[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State

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[22]While this motion was pending, the Supreme Court decided *Agostini v. Felton*, __ U.S. __, 117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997). *Agostini* overruled *Aguilar v. Felton*, 473 U.S. 402, 105 S. Ct. 3232, 87 L. Ed. 2d 290 (1985) and held that the Establishment Clause did not prohibit public school teachers from going into parochial schools to provide remedial education pursuant to a federally funded government program. It has no relevance to the instant case.

to pursue a course of 'neutrality' toward religion, . . . favoring neither one religion over others nor religious adherents collectively over nonadherents." *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 696, 114 S. Ct. 2481, 2487, 129 L. Ed. 2d 546 (1994) (internal citations omitted). To determine whether the practice violates the Establishment Clause, the practice must be analyzed under the three-part test elucidated by the United States Supreme Court in *Lemon v. Kurtzman*.[23] This test states that a government practice regarding religion "will not offend the Establishment Clause if (1) it has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not create an excessive entanglement of the government with religion." *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471, 1483 (3d Cir. 1996) (quoting *Lemon*, 403 U.S. at 612-13, 91 S. Ct. at 2111).

The Medford defendants concede that the poster was removed and relocated because it had a religious theme. Medford Defs.' Br. at 19. Nonetheless, the defendants' actions neither advanced nor inhibited religion, nor did the defendants create an excessive entanglement with religion. As mentioned above, Z.H. had no constitutional right to have his religious poster displayed prominently in his public school, therefore merely

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[23]While the *Lemon* test's viability has been repeatedly called into question, it remains the law of the land and must therefore be applied by this court. *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471, 1484 (3d Cir. 1996).

relocating it had no impact on his, or anyone else's religion. Furthermore, the defendants did not create or foster any sort of government involvement with religion by the simple act of relocating the poster.

Neither did prohibiting Z.H. from reading the "Beginner's Bible" to his class violate the Establishment Clause. Z.H.'s teacher properly exercised her editorial control over the students' reading selections to ensure the material was appropriate for their educational level. This obviously concerns more than just determining whether or not the selection was grammatically correct or lewd, but deciding whether or not the themes the selection presented were suitable for a first-grade class. At this age, it is quite reasonable to assume that these children could have been easily confused whether or not Z.H.'s teacher merely let Z.H. read his book, or if she approved of its message. Presenting the book to the teacher for approval was part of the standard procedure of that class activity; consequently, the books that were allowed to be read were those approved of by the teacher. It is likely that some first-grade students would not fully understand all of the reasons why something could be unsuitable for use in a school activity and could instead believe that the books Ms. Oliva allowed to be read were those books that she liked or those with which she personally agreed.

Moreover, the plaintiffs have not shown how Z.H.'s teacher's actions advanced or inhibited religion in any sense. She never did or said anything regarding his faith. On the contrary, she let him read the "Bible" to himself during his free periods. Z.H. was merely forbidden from reading the book to his classmates during school hours, and this did not affect the practice of a tenant of his religion or his religion in general. Finally, no excessive entanglement

was created by this act. Accordingly, the Medford defendants did not violate the Establishment Clause.

4. Injunctive Relief against the State Defendants

Plaintiffs demand that the State defendants implement a policy

> wherein students may express their religious beliefs in the form of reports, homework, art work and other class work, free of discrimination based on the religious content of their submissions and a policy prohibiting teachers from modifying or excluding religious views from assignments when such religious views would otherwise be germane to the assignment.

Compl. at ¶ 32.

This request is the product of false premises and exemplifies the continuing struggle to find a balance in ensuring students' rights to exercise their religion in our public schools without violating the historic separation of church and state. Public schools are not hostile toward religion. Any student who wishes to say grace over lunch or appeal for divine intervention during a test has that right. Students are also not precluded from expressing their religious views in assignments. Indeed, Z.H. was allowed to make a poster of Jesus, and was also allowed to read his "Beginner's Bible" as part of a school assignment. Furthermore, neither his poster nor his reading selection were altered in any way by his teacher or any other school official. Z.H. was just not permitted to express the religious beliefs contained in his work to his classmates through the medium of the public school. The school did

not forbid him from practicing his religion, it merely chose to tread lightly around creating the impression that it endorsed his religious views.[24] It did so within the boundaries of the constitution.

Religious liberty as guaranteed in the Bill of Rights allows individuals to decide if they want to be religious and, if so, how to practice their religion free from coercion or control. The state defendants should not be asked to involve themselves in religious matters concerning its students. Far from protecting religious freedom, implementing the policy requested would endanger fundamental religious liberties.

CONCLUSION

For the foregoing reasons the motion of (1) defendants Medford Township Board of Education, Grace Oliva, Gail Pratt, and Patrick Johnson (the "Medford defendants"), and (2) defendants State of New Jersey Department of Education and Leo Klagholz, Commissioner of the State of New Jersey Department of Education (the "State defendants"), for judgment on the pleadings pursuant to FED. R. CIV. P. 12(c) is granted.

An appropriate order will be entered.

/s/ JOSEPH H. RODRIQUEZ
U.S.D.J.

Dated: December 30, 1997

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[24]In any event, based on the foregoing analysis and conclusion, the plaintiffs have no right to any remedy because they have suffered no cognizable harm to any constitutionally protected right.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

C.H. as guardian ad litem of Z.H., etc.,	:	Hon. Joseph H. Rodriquez
	:	Civil Action No. 96-2768.
Plaintiffs,	:	
v.	:	ORDER
GRACE OLIVA, et al.,	:	ORIGINAL FILED
	:	DEC 30 1997
Defendants.	:	

For the reasons set forth in this court's Opinion filed even date,

IT IS ORDERED on this 30th day of December, 1997, that the motion of (1) defendants Medford Township Board of Education, Grace Oliva, Gail Pratt, and Patrick Johnson (the "Medford defendants"), and (2) defendants State of New Jersey Department of Education and Leo Klagholz, Commissioner of the State of New Jersey Department of Education (the "State defendants"), for judgment on the pleadings pursuant to FED. R. CIV. P. 12(C) is **GRANTED**.

/s/ Joseph H. Rodriquez
U.S.D.J.

Supreme Court, U.S.
FILED
DEC 26 2000
OFFICE OF THE CLERK

(2)

No. 00-845

In The

Supreme Court of the United States

CAROL HOOD, as guardian ad litem of Zachary Hood, a minor,

Petitioner,

v.

MEDFORD TOWNSHIP BOARD OF EDUCATION, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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24 pp

QUESTION PRESENTED

Whether a first grade student has a First Amendment right to read "The Beginner's Bible" to his classmates as part of a school assignment and whether that student has a concomitant right to recover compensatory and punitive damages from his first grade teacher when that teacher, in an exercise of her educational judgment, determines that "The Beginner's Bible" should not be read to a captive audience of six and seven year old children, as part of her class curriculum and under her supervision.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT FOR CERTIORARI OF RESPONDENTS GRACE OLIVA, GAIL PRATT, PATRICK JOHNSON and MEDFORD TOWNSHIP BOARD OF EDUCATION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

Petitioner seeks plenary review of an *en banc* decision of the Court of Appeals for the Third Circuit affirming the District Court's decision which held: a first grade teacher, and other public school officials, cannot be liable

for damages when that first grade teacher, in a proper exercise of her educational judgment, did not permit Petitioner's son to read a children's version of the Holy Bible to his classmates, during class time and as part of the class curriculum. The Third Circuit specifically affirmed the District Court's judgment on the pleadings with respect to this claim. There is another claim not before this Court which has been remanded to the District Court for further factual development.

1. Factual Background.

The factual background of Petitioner's claim is adequately set forth within the petition. However, certain factual matters which dictate against the granting of the writ must be highlighted.[1]

a. Petitioner's claim is not based upon a school or district policy but on the single, discretionary decision of one first grade teacher.

Petitioner presents this writ as concerning a public school policy related to student reading material. This is not the case. Petitioner did not allege any policy, custom or practice on the part of the Respondent Medford Township Board of Education. App. 7a, 9a. Petitioner's claim is based solely upon a challenge to the educational judgment of a first grade teacher respecting the request of

---

[1] It should also be noted that these facts are based solely on the pleadings, admitted below in the context of Respondents' Rule 12(c) motion.

Petitioner's son to read "The Beginner's Bible" to his classmates as part of the curriculum of that class.

b. Petitioner's son requested to read "The Beginner's Bible" to his classmates, during class time, as part of the curriculum of that class.

Respondent, Grace Oliva, as part of the reading curriculum for her first grade class, permitted those students reaching a certain level of reading proficiency to read a book of their own choosing to the rest of the class. App. 73a. The readings were in the presence and under the supervision of Respondent Oliva, who, prior to the reading, reviewed each student's selection to ensure that it would be suitable for first grade students. The request of Petitioner's son to read "The Beginner's Bible" to his classmates was not a "private" exercise of speech, but rather "state-sponsored" speech occurring as part of the class curriculum.

c. Petitioner's son asked to read a children's version of the Holy Bible to his classmates and not a story loosely based upon a biblical story.

The selection of Petitioner's son was a book entitled "The Beginner's Bible." The cover of the book states the title – "The Beginner's Bible" – and depicts characters from the New and Old Testaments such as Jesus Christ, the apostle Peter, Moses, Noah and Adam and Eve. Each "story" in The Beginner's Bible is based upon an excerpt from the Old and New Testaments. The stories identified include: Jesus' Birth And Resurrection; The Annunciation

to the Virgin Mary; Jesus' Feeding of the Multitude; and Jesus in the Temple.

Petitioner's son informed Respondent Grace Oliva that he wished to read the "A Big Family" to the class. "A Big Family" is based upon Genesis, Chapters 29-33, and tells the story of Jacob's return to his brother Esau. The first page of the story states at the bottom "JACOB RETURNS, from Genesis 29-33", clearly identifying the story's source as the Holy Bible. App. 44a.

d. Petitioner seeks only monetary damages.

Petitioner seeks only money damages against Respondents Grace Oliva, Gail Pratt, Patrick Johnson and the Medford Township Board of Education. App. 46a. Petitioner cannot seek injunctive relief as to these Respondents because her son is no longer a student in the Medford School District and, for reasons unrelated to this case, is currently attending school in another community. App. 45a. Thus, Petitioner seeks only compensation (probably difficult to quantify to begin with) for this alleged one-time incident regarding "The Beginner's Bible."

2. The Proceedings Below.

Petitioner's summary of the proceedings below is notable primarily for its omission of the one case upon which the District Court based its decision and upon which the panel of the Third Circuit based its affirmance.

That case is *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). 49a, 90a-95a.[2]

While the District Court noted that speech in a non-public form must be viewpoint neutral, it specifically stated:

> In the context of the classroom, the inquiry is more specific: educators may "exercis[e] editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."

App. 91a (citation to *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. at 273). The District Court further noted Petitioner's concession that this is the applicable standard. App. 91a.

Analyzing Petitioner's claims under this standard, the District Court went on to find that Respondents did have legitimate pedagogical concerns in preventing an appearance of state endorsement of religion.

> [H]ad the Medford defendants allowed Z.H. to read the "Beginner's Bible" to the rest of his first grade classmates, the possibility exists that they could have construed the presentation to be an endorsement of the Bible by the teacher . . . If Z.H.'s teacher were to praise him for completing his reading assignment skillfully, (i.e. by saying something like "very good"), it is not unlikely that a child in first grade could interpret that comment as an endorsement of the story and the book. *See* Medford Defs.' Br. at

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[2] The evenly divided *en banc* court affirmed the District Court's judgment "without further explication" in accordance with Third Circuit tradition. App. 4a, 11a.

> 21. Therefore, allowing Z.H. to read from the "Beginner's Bible" only to his teacher was a proper accommodation of Z.H.'s right of free expression and the principle of separation of church and state.

App. 93a-95a.

The Court further rejected Petitioner's arguments that "The Beginner's Bible" would not have been offensive to Muslim, Hindu or Jewish students, noting that "[e]ven if every single student teacher and administrator in Z.H.'s public school were strong adherents to Christianity, the Medford defendants' actions would still be appropriate." App. 94a.

The initial memorandum opinion of the Court of Appeals for the Third Circuit affirmed and echoed the District Court's analysis under *Hazelwood* and emphasized the need to "give substantial deference to public school authority discretionary decisions regarding what subjects are appropriate for elementary school classroom discussion." App. 68a.

The second panel opinion of the Court of Appeals affirming the District Court was hardly based "on very different ground" or a "reverse[al]" of its previous panel opinion. Petition for a Writ of Certiorari at 5. Rather, again, the panel of the Circuit Court relied upon *Hazelwood Sch. Dist. v. Kuhlmeier*, described by it as "the Supreme Court precedent most helpful in the current context." App. 49a. Relying upon *Hazelwood*, the panel noted that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical

concerns. "Contrary to plaintiff's suggestion, this remains the law of the land." App. 53a.

The Circuit Court noted the distinction between private student speech, which must be tolerated, and speech within school-sponsored expressive activities "that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school." App. 50a (citation and quotation from *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. at 270-71). The panel further easily distinguished *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 385 (1993) and *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), noting that neither case dealt with school-sponsored expressive activity in a traditional classroom setting. App. 53a.

Petitioner again sought rehearing *en banc* which was granted on December 1, 1999. On August 28, 2000, the *en banc* court issued its decision affirming the District Court with reference to Petitioner's claim regarding the reading of "The Beginner's Bible." App. 1a.

The proceedings below are notable in that because the case never passed the pleading stage, the issue of Respondents' qualified immunity from liability was never reached. *See, e.g., Wilson v. Layne*, 526 U.S. 603, 614 (1999). Specifically, Respondents cannot be subject to liability unless Petitioner's son had a "clearly established right" to read "The Beginner's Bible" to his classmates. *Anderson v. Creighton*, 483 U.S. 635, 636-37 (1987). If anything may be said regarding the "right" to read "The Beginner's Bible" to the classmates of Petitioner's son, it is that this right was not at all clearly established at the time of the incident. If anything, the contrary is true. It may be that

nothing highlights this more than the proceedings below: Petitioner's claim was dismissed by the District Court, that dismissal was affirmed twice by a panel of the Circuit Court and a third time by the evenly divided Circuit Court sitting *en banc*. It would be an anomalous result indeed to hold that a first grade teacher should have known that she was violating a student's rights when she refused to allow him to read "The Beginner's Bible" to his classmates when at least six judges of the Third Circuit Court of Appeals (seven if you count the Honorable Joseph J. Longobardi, Senior United States District Judge for the District of Delaware who sat on the panel deciding Petitioner's appeal but did not participate in the *en banc* decision) felt that Petitioner did not have that right.

REASONS FOR DENYING THE WRIT

I. The Court Of Appeals' Decision Does Not Conflict With The Decision Of This Court And The Decisions Of The Other Circuits.

Petitioner's application for a writ of certiorari is premised upon a false conflict among the Circuit Courts. The falsity of Petitioner's argument is immediately evident from a cursory review of the cases upon which she relies. Petitioner initially characterizes *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502 (2d Cir. 2000), *cert. granted*, 121 S.Ct. 296 (Oct. 10, 2000) (No. 99-2036) as dealing with the "same issue" presented by the facts of this case. Petition for a Writ for Certiorari at 10. Nothing could be

further from the truth. *Good News Club* involved access to school facilities by a religious group during non-school hours. *Good News Club v. Milford Cent. Sch.*, 202 F.3d at 504. *Good News Club* was in no way concerned with "state-sponsored expressive activities" occurring within the classroom as part of the class curriculum squarely controlled by *Hazelwood*. The distinction between the use of school property discussed in *Good News Club* and the regulation of state sponsored student speech in *Hazelwood* is not purely technical. Rather, this distinction goes to the heart of this Court's Free Exercise and Establishment Clause jurisprudence.

A. The Decision Below Is Not In Conflict With The Decisions Of The Seventh, Eighth, Tenth And Eleventh Circuits.

The Third Circuit's decision regarding the regulation of student speech in the context of the curriculum of a first grade class is not in conflict with the decisions of the Seventh, Eighth, Tenth and Eleventh Circuits. The cases relied upon by Petitioner are distinguishable on their facts and on the law, as all of these decisions dealt with either "private" student speech or "equal access" claims. None of the cases relied upon by Petitioner deal with the regulation of "state sponsored" speech in a first grade classroom.

In *Hedges v. Wauconda Comm. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993), the Seventh Circuit held that it was permissible for a junior high school student to distribute religious literature in the hallway of the school.

The Court noted the important distinction between "private" religious speech, which must be tolerated, and religious speech that students would believe is sponsored by the school, noting a school district's "duty to avoid taking sides in religious controversies." *Id.* at 1298. In holding that it was permissible for students to distribute religious literature from a designated location near the school's entrance between the hours of 7:15 a.m. to 7:45 a.m. and 3:15 p.m. to 3:45 p.m., the Court noted that:

> The point of the distinction that we have stressed between private and public acts is that the printed material pupils pass out in the halls will not be analyzed or critiqued in class as part of the school's educational program.

Id. at 1301.

Thus, on its facts, *Hedges* was not concerned with school-sponsored speech occurring as part of the curriculum. In fact, the Court in *Hedges* cited as an example of improper school promotion of religious speech a school district which gave a religious group preferential treatment, convened the student body to hear their presentation and required each pupil to accept a Bible in a formal ceremony. *Id.* at 1299 (citing to *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160 (7th Cir. 1993)).

The Seventh Circuit's recognition of this distinction between private and "school-sponsored" speech (a distinction which Petitioner fails to recognize or understand) can be seen in *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1545 (7th Cir.), *cert. denied*, 520 U.S. 1156 (1997)

(fourth grade plaintiff "free to express himself on religious matters, in both written and spoken form, subject only to restrictions reasonably related to legitimate pedagogical interests.") and *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004 (7th Cir. 1990) (teacher had no right to teach creationism because of school's important pedagogical interest in establishing the curriculum and legitimate concern with possible Establishment Clause violation).

Good News/Good Sports Club v. School Dist. of the City of Ladue, 28 F.3d 1501 (8th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995), is similarly inapposite to the facts of this case for the same reasons as *Milford*. Namely, *Good News/Good Sports Club* dealt only with the equal access claim of a religious club seeking the use of school facilities after school hours on the same basis as other secular organizations. The Court noted that the advanced age of the students (junior high school) did not present an Establishment Clause concern; the club meetings would be held after instructional hours when student attendance is no longer compelled; and the club did not involve the participation of teachers, thereby creating a problem of "the students' emulation of teachers as role models." *Id.* at 1509-1510. Given that the Court in *Good News/Good Sports Club* was not presented with state-sponsored student speech occurring as part of the school's curriculum, it did not apply *Hazelwood*'s test of legitimate pedagogical concerns. *Cf. Henerey v. City of St. Charles Sch. Dist.*, 200 F.3d 1128 (8th Cir. 1999) (regulation of student's speech occurring during campaign for class president was reasonably related to legitimate pedagogical concerns, noting that student speech uttered during participation in

school sponsored activity carries the "imprimatur of the school.") (citation to *Hazelwood*, 484 U.S. at 271).

Church on the Rock v. City of Albuquerque, 84 F.3d 1273 (10th Cir.), *cert. denied*, 519 U.S. 949 (1996), exposes in the most direct way the falsity of plaintiff's argument that there is a "conflict" between the Circuits. Namely, this decision dealt with a city policy related to the showing of a religious film at city-owned *senior centers*. *Church on the Rock* was in no way concerned with the dissemination or discussion of religion in a first grade classroom. One comment from *Church on the Rock* serves to highlight the importance of this distinction:

> [T]he showing of the Jesus film and the distribution of giant print New Testaments can hardly be construed as intimidating or coercive. *People who choose to attend presentations at the senior centers do not become part of a captive audience*: attendance at such programs is purely voluntary and people are free to come and go as they please.

Id. at 1280 (emphasis added).

The distinction between the purely voluntary attendance of persons at the senior center at issue in *Church on the Rock* and the compelled attendance of first grade students requires no further elucidation. *Please see Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 684 (1986) (describing children in public schools as being a "captive audience").

Lastly, there is no conflict with *Chandler v. Siegelman*, 2000 WL 1557134 (11th Cir. 2000). As with the other Circuit Court decisions relied upon by Petitioner,

Chandler was not concerned with state-sponsored student speech occurring in the context of a first grade classroom. In fact, the Eleventh Circuit noted that "even genuinely student-initiated religious speech may constitute state action if the state participates in or supervises the speech . . . therefore, student religious speech must be without oversight, without supervision, subject only to the same reasonable time, place and manner restrictions as all other student speech in school." *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), *cert. granted, vacated and remanded sub nom. Chandler v. Siegelman*, 120 S.Ct. 2714 (2000) (decision of the Circuit Court upholding policy permitting student initiated prayer at school events vacated and remanded for further consideration in light of the decision of *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000)). As with *Chandler*, the District and Circuit Courts below did not condone the "censorship" of private student religious speech. Rather, the District Court and Circuit Court were faced with state-sponsored religious speech, i.e., speech occurring as part of the first grade curriculum. It is this critical distinction that sets Petitioner's claim apart from those decisions allegedly in "conflict" with the Third Circuit and it is that critical distinction which compels the denial of this petition for a writ of certiorari.

B. The Decision Below Does Not Conflict With The Decisions Of This Court In *Lamb's Chapel* And *Rosenberger*.

As set forth above, the "conflict" between the Third Circuit and the decisions of four other circuits is non-existent. Similarly, Petitioner's argument that the Third

Circuit's decision conflicts with *Lamb's Chapel* and *Rosenberger* is based upon a tortured reading of both of these cases, neither of which was concerned with the regulation of state-sponsored student speech in the non-public, closed forum of a first grade classroom.

Both *Lamb's Chapel* and *Rosenberger* are easily distinguished from this case. In *Lamb's Chapel*, plaintiff sought permission to use school facilities on a weekend to show a film on child rearing with a religious viewpoint. This Court emphasized:

> The showing of this film series *would not have been during school hours*, would not have been sponsored by the school and would have been open to the public, not just to church members.

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993) (emphasis added).

In short, *Lamb's Chapel* is a case that deals solely with the ability of religious groups to have equal, after-hours use of public school facilities that have been opened up for use by other groups such as the Boy Scouts, Cub Scouts, community groups, etc. *Lamb's Chapel* is not a case which deals with the regulation of student speech as part of a public school's curriculum.

Similarly, *Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) has absolutely nothing to do with the regulation of classroom speech in a university setting, let alone the regulation of speech in a first grade classroom. The Court in *Rosenberger* itself stated that "a holding that the university may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech,

which is controlled by different principles." *Id.* at 834 (citing to *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. at 270-272). Factually, *Rosenberger* was presented with an issue related to the funding of a publication with a Christian editorial viewpoint at a public university. Again, the distinction between the funding of a publication at an institution of higher learning, compared with the restriction of a first grader's class presentation is evident on its face to everyone but Petitioner. The latter, and the facts of this case, is controlled by the deferential standard set forth in *Hazelwood*. The former, and the facts as set forth in *Rosenberger*, is perhaps controlled by a more strict standard.

Closer to the fact of this case is a decision Petitioner leaves unmentioned: *Santa Fe Independent Sch. Dist. v. Doe*, 120 S.Ct. 2266 (2000) invalidating policy of permitting student led, student initiated prayer before football games because of Establishment Clause concerns. In striking the District's policy, this Court insisted that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 2275 (quoting from *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens*, 496 U.S. 226, 250 (1990) (opinion of O'CONNOR, J.)). Moreover, the Court concluded that the pre-game invocation could not be regarded as "private speech", noting that: the invocations were authorized by a government policy; the invocations took place on government property; and the invocations were given at government-sponsored, school-related events. *Id.* at 2278.

If anything, the facts presented by this case are more egregious than those presented to the Court by *Santa Fe*. The speech at issue in *Santa Fe* took place as part of a school's extra-curricular activity and not part of a school's curriculum. Additionally, attendance at the football games discussed in *Santa Fe* was not compelled.[3] The location of the speech itself, while on school property, occurred out of doors and not inside the school itself. Furthermore, the students at issue in *Santa Fe* were in high school and thus from between 14 to 18 years of age.

Comparatively, Petitioner's speech at issue in this case occurred (or would have occurred were it not for the actions of Respondent Oliva) in the classroom and as part of the first grade class curriculum, with the approval and under the supervision of Respondent Oliva. Additionally, these first grade classmates fit the traditional definition of a "captive audience" and would not have been able to absent themselves from the reading of "The Beginner's Bible." Lastly, the classmates of Petitioner's son were only in the first grade and, thus, least likely to be able to distinguish between a choice of reading that was his alone and a selection that bore his teacher's approval and the concomitant "imprimatur" of the state.

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[3] The Court did note that attendance is certainly mandatory for certain members of the school, such as the football players, cheerleaders, band members, etc. *Id.* at 2280. That said, there is still a distinction between attending an after-school athletic event (which is not mandatory in truest sense of the word) and attendance at school itself which the state absolutely compels.

Thus, the decision below is certainly compelled by *Santa Fe* and the purported conflict with *Rosenberger* and *Lamb's Chapel* is nonexistent.

II. The Petition For Writ Of Certiorari Should Be Denied As Premature.

"We generally await final judgment in the lower court before exercising our certiorari jurisdiction." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (opinion of SCALIA, J. respecting the denial of the petition for writ of certiorari).

The decision of the Circuit Court below is certainly interlocutory in nature because it did not dispose of all issues as to all parties. Notably, Petitioner's claim related to the relocation of a poster of Jesus Christ was remanded to the District Court in order to permit Petitioner to amend. Petitioner has not yet amended, therefore this aspect of Petitioner's case has not been resolved. Additionally, Petitioner has not indicated that the claim related to the poster is being dismissed.

Petitioner also appears to have placed some great importance upon this claim related to the poster, viewing it as evidence of a continuum of hostility toward religion as exhibited by Respondents. As an example, while the claim related to the poster has been remanded and certainly is not before this Court, Petitioner discusses the so-called "poster incident" and the Court of Appeals' *en banc* opinion with respect to the poster incident at length. Petition for a Writ of Certiorari at 5 and 8-9.

Clearly then, if Petitioner feels that the poster incident is important enough to be discussed in the context of the petition for a writ of certiorari, any review in this Court should await the disposition of this claim. Thus, the exercise of this Court's certiorari jurisdiction (if at all) should await final judgment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

CAROL HOOD, *as guardian ad litem of Zachary Hood, a minor,*

Petitioner,

v.

MEDFORD TOWNSHIP BOARD OF EDUCATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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1. Respondents offer an assortment of alleged factual distinctions between the viewpoint discrimination in this case and that discussed in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), and in the decisions of the Second, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits cited in our Petition. All of these attempted factual distinctions miss the point: The threshold issue below was the district court's holding—ultimately affirmed by the divided *en banc* court—that discriminating against Zachary Hood's religious speech solely because it was religious was not viewpoint discrimination at all. It is this issue of how to classify discrimination against religious speech that has divided the Courts of Appeals. The various factual circumstances that so fascinate Respondents

may be relevant to the subsequent question of whether such discrimination can be justified. They are not relevant to the question of how that discrimination is classified in the first place.

2. Contrary to Respondents' protestations, that question was in no way foreclosed by *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). *Hazelwood* dealt with the issue of *subject matter* restrictions on student speech in a school-sponsored newspaper that was part of the school curriculum. The Court held:

> educators do not offend the First Amendment by exercising editorial control over the *style and content* of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

484 U.S. at 273 (emphasis added). This Court, in *Hazelwood*, did not deal at all with *viewpoint*-based restrictions in such non-public fora because, as Justice Brennan observed, the school officials in that case had conceded that their policy must be viewpoint neutral. *See id.* at 287 n.3 (Brennan, J., dissenting).

Hazelwood was thus a particular application of the rule laid down in *Cornelius v. NAACP Legal Defense & Ed. Fund.* 473 U.S. 788 (1985). *Cornelius* held that discrimination based on subject matter and speaker identity in a non-public forum is permissible "so long as the distinctions drawn are reasonable in light of the purpose served by the forum *and are viewpoint neutral*." *Id.* at 806 (emphasis added). *See also R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 n.6 (1992) (observing that *Cornelius* and other cases permit "reasonable and viewpoint-neutral content-based discrimination in nonpublic forums"). Neither *Hazelwood* nor any other decision of this Court supports the notion that viewpoint discrimination may be upheld on anything less than a compelling governmental

interest.[1] To be sure, what is compelling in a grammar school may not be compelling in a high school. And what is compelling there may not be compelling in an adult forum. But, once again, that is a subsequent question. The question presented in this case is whether discrimination against religious speech solely because it is religious is viewpoint discrimination in the first instance.

3. Respondents also attempt to erect various procedural barriers to this Court's review. None is daunting. Respondents argue that qualified immunity may ultimately be available to some of the Respondents. This is beside the point for two reasons. First, as Judge Alito noted below, "of course the qualified immunity defense would not apply to the school board in its official capacity." App. 26a (citing *Owen v. City of Independence*, 445 U.S. 622, 639-650 (1980)).[2] Second, even

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[1]Even in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986), this Court emphasized that school officials' discipline of a student for giving a sexually suggestive campaign speech was not viewpoint discrimination. *See Bethel*, 478 U.S. at 685 ("the penalties imposed in this case were unrelated to any political viewpoint").

[2]Respondents attempt to circumvent this point by claiming that Petitioner has not alleged "any policy, custom or practice on the part of the Respondent Medford Township Board of Education. App. 7a, 9a." That is incorrect. The portions of the Court of Appeals' opinion which Respondents cite for that proposition are not about the Board's involvement in the story incident, but about the separate claim regarding the removal of Petitioner's Thanksgiving poster. As for the story incident, the complaint alleges that Petitioner made a "formal demand upon . . . Defendant Township of Medford Board of Education" but that the Board of Education "failed to respond

those Respondents who can argue for qualified immunity can only do so later. As Judge Alito also noted, this case comes to this Court after the grant of Respondents' motion for judgment on the pleadings. Thus, even if the Court "were to entertain the qualified immunity argument at this time, [it] would still be required, as the first step of [its] analysis, to decide whether the complaint stated a First Amendment claim." App. 26a (citing *Siegert v. Gilley*, 500 U.S. 226, 231 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 802 (1982)). Respondents' belated theory of qualified immunity (*see* App. 26a) should be heard, if at all, on remand. It should not dissuade this Court from granting plenary review.

Finally, Respondents argue that "the exercise of this Court's certiorari jurisdiction . . . should await final judgment." Respondents' Brief at 17-18. However, as we discussed in our Petition at pp. 17-18, this case in its present posture already is a final judgment within the meaning of this Court's precedents. Even Respondents acknowledge that the decision on the story incident was affirmed by the Court of Appeals, and that the poster incident which the lower court remanded is a separate claim:

> The Third Circuit specifically affirmed the District Court's judgment on the pleadings with respect to [the story] claim. There is another claim not before this Court which has been remanded to the District Court for further factual development.

Respondents' Brief at 2.

In short, the Courts of Appeals are divided over the question of how to characterize discrimination against religious

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to these demands." Complaint ¶ 23. *See also* App. 45a; App. 74a-75a. Under the standard set forth in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 167 (1993), these allegations are sufficient.

speech solely because it is religious. And this case, together with *Good News Club v. Milford Central School*, No. 99-2036, is an appropriate vehicle for resolving that conflict.

CONCLUSION

For the foregoing reasons, and for those reasons stated in the Petition, the Petition for a writ of *certiorari* should be granted or, in the alternative, should be held for disposition in light of this Court's decision in *Good News Club v. Milford Central School*, No. 99-2036.

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